Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Wisconsin Court Of Appeals, District I

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE WISCONSIN COURT OF APPEALS' FAILURE TO CONDUCT A DE NOVO REVIEW OF THE LEGAL ERROR IN THIS CASE IN ACCORDANCE WITH ESTABLISHED CASE LAW STANDARDS AND THE WISCONSIN SUPREME COURT'S FAILURE TO RECTIFY THIS ERROR VIOLATE RONALD W. MORTERS' RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SEC. 1, OF THE WISCONSIN CONSTITUTION?

II. DID THE WISCONSIN SUPREME COURT'S USE OF THE DISCRETIONARY REVIEW PROCESS TO AVOID REVIEWING THE CONSTITUTIONAL VIOLATION THEREIN VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

The caption of this petition identifies all of the parties who have participated in both the trial court and appellate proceedings in this case. Shannon L. Morters was also a plaintiff in the consolidated actions, but she has not participated in any appellate proceedings because no fee assessment was made against her. The Morters' attorney, Robert E. Sutton, did not appeal from the fee assessment against him. Because this petition involves a deprivation of Fourteenth Amendment rights and a violation of the Supremacy Clause by the Wisconsin courts, copies of this petition have been forwarded to the Attorney General for the State of Wisconsin. As indicated in the Jurisdiction section, notification has been made as required by Supreme Court Rule 29.4(c).

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* Effective July 1, 2005, Sec. 814.025 has been repealed as part of the recreation of Wisconsin's trial court frivolity law.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Ronald W. Morters, prays that a Writ of Certiorari issue to review the decision of the Wisconsin Court of Appeals, District I, entered in this action on January 21, 2009 and the order of the Wisconsin Supreme Court entered on May 13, 2009 wherein the Supreme Court denied the Petition for Review of said Court of Appeals' decision.

OPINIONS BELOW

The order of the Wisconsin Supreme Court dated May 13, 2009, denying the Petition for Review is unpublished and reprinted in the Appendix ("App.") to this Petition at H1-2. The decision of the Wisconsin Court of Appeals, District I, dated January 21, 2009, is unpublished and reprinted in the Appendix at A1-6.

JURISDICTION

The decision of the Wisconsin Court of Appeals, District I, was entered on January 21, 2009. A timely Petition for Review of said decision was denied by the Wisconsin Supreme Court in an order entered on May 13, 2009 thereby affirming the Court of Appeals' decision and exhausting all state judicial remedies. This petition for writ of certiorari was filed within 90 days of the Wisconsin Supreme Court's order denying review. The United States Supreme Court has jurisdiction to review the order of the Wisconsin

Supreme Court and the decision of the Wisconsin Court of Appeals pursuant to 28 U.S.C. § 1257(a).

Rule 29.4(c) Statement

Because this petition draws into question the constitutionality of Wisconsin's discretionary review statutes, Mr. Morters hereby provides notice in compliance with Supreme Court Rule 29.4(c) that 28 U.S.C. § 2403(b) may apply. Accordingly, copies of this petition have been served on the Attorney General for the State of Wisconsin.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are as follows: Section 1 of the Fourteenth Amendment, the First Amendment, the Fifth Amendment, Article III, Sec. 2, paragraph 2, and Article VI, paragraph 2. These provisions are set forth at App. I1-3. 28 U.S.C. § 1257(a) is involved and is set forth at App. I1. This case also involves Article I, Secs. 1 and 9, and Article VII, Secs. 3(2), 3(3), and 5(3) of the Wisconsin Constitution which are reproduced at App. I4-5. The state statutes involved are Wisconsin Statutes, Secs. 806.07(1)(h), 808.03(1), 808.10, and 809.62(1m) & (1r) which are set forth at App. I5-8.

STATEMENT OF THE CASE

A. Previous Circuit Court And Appellate Proceedings

Ronald W. Morters and his granddaughter, Shannon, commenced separate actions for professional negligence and breach of contract in Milwaukee County Circuit Court against Attorney Charles H. Barr and his insurer, TIG.[1] (App. A3) Such actions arose out of Barr's handling of their personal injury case. (App. F4) These cases were consolidated before the Honorable John A. Franke. Ultimately, the Morters' claims were dismissed through the granting of partial summary judgment and directed verdict. (App. F4) Final judgment of dismissal was entered on July 16, 2001.

On June 22, 2001, Barr and TIG filed a motion for a frivolity finding and award of attorney's fees and costs against the Morters pursuant to former Wisconsin Statutes, Sec. 814.025. (App. A3) Due to judicial rotation, Judge Dennis P. Moroney replaced Judge Franke as the presiding judge in the case on August 1, 2001. The frivolity motion was pending when Judge Moroney took over the case. Taxable costs of litigation in the amount of $1,785.55 were awarded to Barr and TIG by a judgment entered on August 31, 2001.

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[1] Ronald's action was filed in July of 1999 and Shannon's was commenced in February of 2000.

On July 24, 2001, the Morters appealed from the judgment dismissing the case. (App. F5) Because the trial court frivolity matter had not been adjudicated when such appeal was filed, it was not part of this appeal. During the course of that appeal, Barr and TIG filed a motion with the Wisconsin Court of Appeals for an appellate frivolity finding and award of appellate costs and fees due to deficiencies in the Morters' briefs. (App. F5) In a decision dated April 30, 2002, the Court of Appeals affirmed the dismissal of the action. (App. F5, A3) Based on the briefing deficiencies, the Court of Appeals also determined the appeal to be frivolous and remanded the case to the trial court for a determination of the amount of appellate costs. (App. F5, A3) On May 20, 2002, Judge Moroney assessed the sum of $3,567.35 in appellate costs against Mr. Morters and $3,567.36 against his attorney, Robert E. Sutton. (App. A3) Judgment reflecting the appellate award was entered on June 20, 2002. (App. C1-2)

The Morters then filed a petition for review with the Wisconsin Supreme Court challenging the adjudication on the merits of the action and the appellate frivolity determination. (App. F5) In an order issued on October 21, 2002, the Supreme Court vacated the portion of the decision wherein the appeal was deemed to be frivolous and remanded the case to the Court of Appeals for reconsideration of whether the appeal was frivolous. (App. E1-2) In its January 14, 2003 decision, the Court of Appeals determined that the appeal was not frivolous but

imposed sanctions for appellate briefing rules violations. (App. F2-3) The Court of Appeals then remanded the case to the trial court for a determination of those costs. (App. F10) Pursuant to a stipulation executed in November of 2003, Mr. Morters and Attorney William P. Croke, who represented Barr and TIG, agreed that there would be no claim against Mr. Morters for such appellate costs and fees. (App. G1-2) An order reflecting such stipulation was entered on November 25, 2003. (App. G2)

With respect to the trial court frivolity motion, Judge Moroney ruled in his October 18, 2001 decision that all of the Morters' claims were frivolous. On April 29, 2002, the trial court assessed the sum of $20,000.00 in trial court frivolity costs which was apportioned equally between Mr. Morters and Attorney Sutton. (App. A3-4) Judgment for his $10,000.00 share of the costs was entered against Mr. Morters on July 29, 2002. (App. D1-2)

Through a series of appellate and trial court proceedings, Mr. Morters unsuccessfully sought relief from the trial court frivolity judgment. Mr. Morters appealed to the Wisconsin Court of Appeals but was unsuccessful. He filed a petition for review with the Wisconsin Supreme Court which was denied on June 13, 2003. His petition for certiorari to the United States Supreme Court, which was designated as No. 03-369, was denied in an order dated November 17, 2003.

On December 12, 2003, Mr. Morters filed a motion in Milwaukee County Circuit Court pursuant to Wisconsin Statutes, Sec. 806.07(1)(h), to set aside the trial court frivolity judgment.[2] The trial court denied such motion on January 26, 2004, and the Wisconsin Court of Appeals affirmed the denial in its December 21, 2004 decision. On March 8, 2005, the Wisconsin Supreme Court denied his petition for review of such matter. In a petition for certiorari designated as No. 04-1621, Mr. Morters requested a review of these adjudications. On October 3, 2005, the United States Supreme Court denied the petition. At the conclusion of this litigation, no attempt was made to collect the $10,000.00 trial court frivolity judgment or the $1,785.55 judgment for taxable costs.

B. Subsequent Events in November of 2007

In November of 2007, Mr. Morters attempted to refinance his home. As expected, the $1,785.55 judgment for taxable costs and the $10,000.00 judgment for trial court frivolity costs surfaced when Morters' lender conducted its credit search. Mr. Morters requested his lender to obtain a payoff statement. (App. N2)

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[2] Sec. 806.07(1) is the Wisconsin Statute pertaining to relief from judgment or order. Subsection (h) of that statute provides for relief for "any other reasons justifying relief from the operation of the judgment." The grounds for Ronald's prior motion for relief were different from those in the matter at hand.

On November 20, 2007 a payoff letter was obtained from Barr which recited that Morters owed the aforementioned two judgments along with an additional judgment in the amount of $3,567.35. (App. M1-2, N2-3) A copy of the payoff letter was forwarded to Attorney Croke who took no action. (App. M2, P2) After reviewing the payoff letter, Ronald realized that Barr was attempting to collect the appellate fee award previously nullified by the October 21, 2002 order of the Wisconsin Supreme Court and subsequent proceedings in the case. (App. N3) Because his lender refused to proceed unless all three judgments were paid, Mr. Morters was unable to conclude the refinancing transaction. (App. N3)

C. Trial Court Proceedings

On January 18, 2008, Mr. Morters filed a motion pursuant to Sec. 806.07(1) for relief from the $3,567.35 appellate fee judgment and the $10,000.00 judgment for trial court frivolity fees. Judge Franke, who had been rotated back into the civil division, was assigned to adjudicate the motion.

Mr. Morters contended that three subsections of Sec. 806.07(1) required relief from the appellate frivolity judgment. Because of the Wisconsin Supreme Court's order, Sec. 806.07(1)(f) which provides for relief when "a prior judgment upon which the judgment is based has been reversed or otherwise vacated", was clearly applicable. Sec. 806.07(1)(d) required relief because the Supreme Court's order

had rendered the judgment void. Finally, the stipulation and order in November of 2003 had discharged any potential obligation for appellate costs, and Sec. 806.07(1)(e) required relief from a judgment which had been satisfied, released, or discharged.

With respect to the $10,000.00 trial court frivolity judgment, Ronald argued that he was entitled to relief under Sec. 806.07(1)(h) which allows relief "for any other reasons justifying relief from the operation of the judgment." Mr. Morters believed Barr's action was a calculated attempt to collect what he knew was not owed to him. Because Barr fraudulently attempted to collect the $3,567.35 void judgment, Mr. Morters asserted that he was entitled to relief from the $10,000.00 judgment.

At the April 1, 2008 motion hearing, the trial court granted relief from the appellate frivolity judgment. (App. J11-12) The Court noted that there was not any question that such judgment should be vacated. (App. J11) The Court denied relief from the trial court frivolity judgment, however, because it believed Morters had failed to demonstrate some kind of malfeasance. (App. J11-12) Although admitting there was room to be suspicious, the Court believed that there was no evidence of Barr acting in bad faith. (App. J12-13) The trial court interpreted the situation as an attempt to execute on a judgment that should have been vacated and characterized the judgment as being one which was never vacated. (App. J13-15) An order reflecting the Court's decision was entered on April 17, 2008. (App. B1-3)

D. Court of Appeals Proceedings

On May 5, 2008, Mr. Morters appealed from the portion of the order denying relief from the $10,000.00 trial court frivolity judgment. In his Appellant's Brief, he presented a substantial argument showing that the trial court's erroneous legal interpretation as to the status of the appellate fee judgment resulted in an erroneous exercise of discretion. (App. K2-6) Under Wisconsin law, an erroneous view of the law constitutes an erroneous exercise of discretion. (App. K5) Ronald discussed substantial evidence of malfeasance which constituted extraordinary circumstances justifying relief. Finally, Mr. Morters outlined the need for relief in order to protect his right to equal protection of law. (App. K6-10)

In a short per curiam opinion dated January 21, 2009, the Court of Appeals affirmed the trial court's decision. (App. A6) None of Ronald's arguments were addressed. (App. A1-6) The Court simply reiterated the trial court's conclusions and indicated that the lower court followed proper procedure and appropriately exercised its discretion when denying the motion. (App. A5-6)

E. Supreme Court Proceedings

In his petition for review to the Wisconsin Supreme Court, Mr. Morters reiterated the trial court's erroneous legal interpretation as to the status of the appellate fee judgment which resulted in an

erroneous exercise of discretion. (App. L8-11) He again pointed out that an erroneous view of the law constitutes an erroneous exercise of discretion. (App. L2, 3, 6 & 7) Mr. Morters discussed the de novo standard of review for questions of law and the deprivation of appellate due process which occurred when the Court of Appeals refused to address the legal issue. (App. L3-8) He outlined substantial evidence of Barr's malfeasance which constituted extraordinary circumstances justifying relief. Finally, Mr. Morters discussed the deprivation of his right to equal protection of law which resulted from the trial court and Court of Appeals' decisions. (App. L11-14)

The Wisconsin Supreme Court denied Ronald's petition for review in its May 13, 2009 order. (App. H1-2) The Court of Appeals' departure from appropriate standards of appellate review and the Supreme Court's refusal to remedy this violation has effectively deprived Ronald of appellate due process. The Court's failure to rectify the errors of the trial court and Court of Appeals has violated Mr. Morters' right to equal protection of law. By virtue of the arguments presented in Ronald's appellate filings and the inaction of the State of Wisconsin's highest court, the deprivation of Ronald's constitutional rights was timely and properly raised and is now properly within the jurisdiction of this Court for review on a writ of certiorari.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. THE WISCONSIN COURT OF APPEALS' FAILURE TO CONDUCT A DE NOVO REVIEW OF THE LEGAL ERROR IN THIS CASE IN ACCORDANCE WITH ESTABLISHED CASE LAW STANDARDS AND THE WISCONSIN SUPREME COURT'S FAILURE TO RECTIFY THIS ERROR HAVE VIOLATED RONALD W. MORTERS' RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SEC. 1, OF THE WISCONSIN CONSTITUTION.

A. Introduction and General Constitutional Discussion

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the States from depriving any person of life, liberty, or property without due process of law, and the Equal Protection Clause forbids the States from denying "to any person within its jurisdiction the equal protection of the laws." Article I, Sec. 1, of the Wisconsin Constitution declares that Wisconsin's citizens have certain inherent rights, among those are life, liberty, and the pursuit of happiness. The Wisconsin Supreme Court has interpreted Article I, Sec. 1, as preserving freedoms substantially equivalent to those guaranteed by the Fourteenth

Amendment. See *Chicago & N.W. Ry. v. La Follette*, 43 Wis. 2d 631, 643, 169 N.W. 2d 441 (1969). Article I, Sec. 9, of the Wisconsin Constitution further protects due process and equal protection rights by providing that every person is entitled to a remedy in the laws for his injuries. In *Metzger v. Wisconsin Dept. of Taxation*, 35 Wis. 2d 119, 129, 150 N.W. 2d 431 (1967), the Wisconsin Supreme Court interpreted Article I, Sec. 9, as entitling litigants to their day in Court. Mr. Morters' due process and equal protection rights are thus guaranteed by both Constitutions.

In the following discussion, Ronald will demonstrate that the decisions of the Wisconsin Court of Appeals and Wisconsin Supreme Court have effectively deprived him of his constitutional rights of appellate due process and equal protection under the law. Since the Wisconsin courts are an arm of the State and the original assessment of trial court frivolity costs was punitive in nature,[3] the requisite state action necessary to invoke the protection of the Fourteenth Amendment is certainly present.

B. Constitutional Protection of Appellate Rights

The Supreme Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause does not require a State to provide

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[3] *Tigerton v. Minniecheske*, 211 Wis. 2d 777, 785, 565 N.W. 2d 586 (Ct. App. 1997) recognized the statute's punitive purpose.

appellate review. See *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956); and *District of Columbia v. Clawans*, 300 U.S. 617, 627, 57 S. Ct. 660, 81 L. Ed. 843 (1937). *When the State does provide an appeal, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others.* See *Lindsey*, 405 U.S. at 77; *Griffin*, 351 U.S. at 18; and *Smith v. Bennett*, 365 U.S. 708, 712-714, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961). In a plurality opinion in *Griffin*, the Court noted that " . . . at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." *Griffin*, 351 U.S. at 18. Once a State affords appellate relief, the State may not "bolt the door to equal justice." *Griffin*, 351 U.S. at 24 (Justice Frankfurter concurring in judgment).

In *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966), the Court recognized that once appellate avenues are established, *they must be free of unreasoned distinctions that can only impede open and equal access to the courts.* Due process of law protects against arbitrary action. *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) and *Nebbia v. People of New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934). *Black's Law Dictionary*, 4th Edition (1957) defines arbitrary as "without adequate determining principle", "not done or acting according to reason or judgment", "without cause based upon law", or "not

governed by any fixed rules or standard". In *Smith v. Robbins*, 528 U.S. 259, 276, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000), the Court discussed how the Due Process and Equal Protection Clauses converge to require effective appellate review for indigent defendants. These Clauses also converge to protect Ronald's appellate rights guarding against arbitrariness and discriminatory treatment in the proceedings.

C. Appellate Relief in Wisconsin

The people of Wisconsin recognized the importance of appellate review. Article VII, Sec. 3(2), of the Wisconsin Constitution confers appellate jurisdiction on the Wisconsin Supreme Court over all courts, and Sec. 3(3) provides that the Supreme Court may review judgments and orders of the Court of Appeals. Article VII, Sec. 5(3), gives the Court of Appeals appellate jurisdiction in their respective districts. In accordance with the Constitution, the Wisconsin legislature determined that a dissatisfied litigant should have one appeal as of right with an opportunity to seek discretionary review thereafter in the Wisconsin Supreme Court. Sec. 808.03(1) of the Wisconsin Statutes gives litigants an appeal as of right to the Wisconsin Court of Appeals from a final judgment or order of a Wisconsin circuit court. Secs. 808.10 and 809.62 authorize discretionary review of decisions of the Court of Appeals by the Wisconsin Supreme Court. Since Wisconsin created a system of appellate review, appellate proceedings must comply

with the requirements of due process and equal protection.

D. The De Novo Standard of Review for Questions of Law

A vital principle of appellate due process which has evolved in Wisconsin is the de novo standard of review for questions of law. The Wisconsin courts have recognized that legal questions are the province of the appellate courts and are reviewable ab initio. See *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 551, 309 N.W. 2d 366 (Ct. App. 1981) and *Jaeger Baking Co. v. Kretschmann*, 96 Wis. 2d 590, 594, 292 N.W. 2d 622 (1980). An *appellate court must decide questions of law independently*, without deference to the decision of the circuit court. *State v. Vanmanivong*, 2003 WI 41,[4] par. 17, 261 Wis. 2d 202, 661 N.W. 2d 76 (2003). The Supreme Court decides questions of law independently without deference to the trial court or court of appeals. *Ball v. District No. 4, Area Board*, 117 Wis. 2d 529, 537, 345 N.W. 2d 389 (1984). The aforementioned constitutional, statutory, and case law provisions have created a uniform standard of appellate due process which requires a fresh, independent, and reasoned analysis of questions of law.

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[4] This is the Wisconsin public domain citation, and the decision can also be accessed through the Wisconsin Supreme Court's Web Site at www.wicourts.gov.

The de novo standard of review for legal questions and conclusions of law is followed in the federal system and in numerous other jurisdictions. See for example, *United States v. Singer Mfg. Co.*, 374 U.S. 174, 192-193, 83 S. Ct. 1773, 10 L. Ed. 2d 823 (1963); *Murphy v. Turner*, 426 F. 2d 422, 423 (10th Cir. 1970); *Campana Corp. v. Harrison*, 114 F. 2d 400, 405-406 (7th Cir. 1940); *Crocker National Bank v. City and County of San Francisco*, 49 Cal. 3d 881, 264 Cal. Rptr. 139, 782 P. 2d 278, 281 (Cal. 1989); *Gilbert v. El Paso Co.*, 575 A. 2d 1131, 1141-1142 (Del. Supr. 1990); *Watson v. National Surety Corp.*, 468 N.W. 2d 448, 450 (Iowa 1991); *Griffin v. State*, 14 Kan. App. 2d 803, 799 P. 2d 521, 523 (Kan. App. 1990); *Norfolk Elec. v. Fall River Housing Auth.*, 417 Mass. 207, 629 N.E. 2d 967, 971 (Mass. 1994); and *Laramie v. Hysong*, 808 P. 2d 199, 202 (Wyo 1991).

E. Legal Errors Defined as an Erroneous Exercise of Discretion

Ronald's appeal presented a legal question and constitutional concern which arose within the context of a discretionary determination. Under Wisconsin law, motions for relief from judgment are directed to the sound discretion of the trial court. *Brown v. Moser Lee Co.*, 164 Wis. 2d 612, 616-617, 476 N.W. 2d 294 (Ct. App. 1991). The test on review of a trial court's order refusing to reopen a judgment is whether such refusal was an abuse or erroneous exercise of discretion. *Conrad v. Conrad*, 92 Wis. 2d 407, 414, 284 N.W. 2d 674 (1979) and *City of Brookfield v.*

Milwaukee Metro Sewerage District, 171 Wis. 2d 400, 423, 491 N.W. 2d 484 (1992).

Wisconsin case law has clearly defined errors of law as being an erroneous exercise of discretion. According to *State v. Black*, 2001 WI 31, par. 9, 242 Wis. 2d 126, 624 N.W. 2d 363 (2001), an appellate court will ordinarily find an erroneous exercise of discretion if the trial court applied the wrong legal standard. In *Sullivan v. Waukesha County*, 218 Wis. 2d 458, 470, 578 N.W. 2d 596 (1998), *the Court indicated that misapplication or an erroneous view of the law is an erroneous exercise of discretion. To be sustained, a discretionary decision must be based upon the appropriate and applicable law. Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W. 2d 16 (1981). Furthermore, the application of constitutional principles to the facts of a case presents a question of law. *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 62, 443 N.W. 2d 50 (Ct. App. 1990). When errors of law and constitutional problems arise within the context of discretionary determinations, the United States and Wisconsin Constitutions, Sec. 808.03(1), and the uniform standards of appellate review discussed in Section D converge to impose on the Wisconsin appellate courts a legal responsibility to conduct a de novo review of such matters.

F. The Need For Supreme Court Review

Despite extensive arguments in Ronald's brief and petition for review regarding the legal error and constitutional issue, the Court of Appeals and

Wisconsin Supreme Court refused to address these matters. (App. K1-10, L1-14) Mr. Morters did not receive the type of uniform review and appellate due process to which he was constitutionally entitled. In *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981), the Court recognized that it has no supervisory jurisdiction over state courts and its review of state court judgments is confined to *evaluating them in relation to the United States Constitution*. An analysis of the actions of the Wisconsin Courts in relation to the Due Process and Equal Protection Clauses is precisely what this case involves. In *Castillo v. McConnico*, 168 U.S. 674, 683, 18 S. Ct. 229, 233, 42 L. Ed. 622 (1898), the Court indicated that it is the final province of the Supreme Court to determine the existence of due process of law.

According to Supreme Court Rule 10(c), one consideration for granting certiorari is when a state court has decided an important question of federal law in a way that conflicts with relevant decisions of the Supreme Court. The Wisconsin Court of Appeals' departure from uniform standards of appellate review and the Wisconsin Supreme Court's approval of the same certainly conflict with the Court's decisions cited previously which protect due process and guarantee equal protection at the appellate level. The decisions herein are characterized by arbitrariness and a lack of uniformity since they do not adhere to the standard of de novo review established for the evaluation of legal questions. Although Wisconsin's appellate statutes and standards of review are

nondiscriminatory on their face, laws which are nondiscriminatory on their face may be applied in such a way as to violate the Equal Protection Clause. See concurring opinion of Justice Douglas in *Furman v. Georgia*, 408 U.S. 238, 257, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). The failure to follow the de novo standard in this case discriminates against Mr. Morters.

Procedural due process violations fall into two basic categories – those in which the process afforded was somehow deficient and those wherein the litigant asserts that he was denied access to a particular legal process. This case falls within the latter category because Mr. Morters was denied access to a de novo review of a legal issue. Situations involving the denial of access to a legal procedure require strict scrutiny and the intervention of the Supreme Court to remedy such violations.

Article III, Sec. 2, of the Constitution gives the Supreme Court appellate jurisdiction in certain cases with such exceptions and under such regulations as Congress shall make. When 28 U.S.C. § 1257 was revised in 1988, direct appeals from State court judgments were abolished and certiorari became the sole path for Supreme Court review of these judgments. By virtue of this amendment, the Supreme Court was given considerable discretion in deciding what cases to accept for review.

When 28 U.S.C. § 1257(a) and Article III, Sec. 2, are read in conjunction with the First and Fifth

Amendments, Mr. Morters believes *the Court has a duty to grant certiorari in due process cases involving the denial of access to procedure.* Among other things, the First Amendment provides that Congress shall make no law abridging the right of the people to petition the Government for a redress of grievances. The relevant portion of the Fifth Amendment indicates that no person shall be deprived of life, liberty, or property without due process of law.

If certiorari is not granted in cases where the denial of access to procedure is readily apparent, Congress by virtue of the jurisdiction given to the Court pursuant to Article III, Sec. 2, is essentially making a law which abridges the right to seek redress of grievances in the judicial forum and denies due process. Because of these constitutional considerations, due process "access denial" cases require the strictest scrutiny.

Fundamental fairness also requires review of such cases. A fair trial in a fair tribunal is a basic requirement of due process. *Weiss v. United States*, 510 U.S. 163, 178, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) and *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The Supreme Court recently reaffirmed this principle in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, 129 S. Ct. 2252, 2259, ___ L. Ed. 2d ___, 77 U.S.L.W. 4456 (2009) which dealt with judicial recusal in the Supreme Court of Appeals of West Virginia. While the substantive issues in *Caperton* and this case are

different, both cases involve due process and fundamental fairness at the appellate level. The concern in *Caperton* was with the sufficiency of appellate due process. Although this case does not involve a $50,000,000.00 judgment between large corporations as in *Caperton*, the violation of due process is more serious in this case because there is an outright denial of access to appellate due process. Like *Caperton*, the due process violation herein requires review.

When considering this petition, the Court should realize that the impact of a decision herein would extend beyond Wisconsin. Since other jurisdictions utilize the de novo standard of review for legal questions, a decision by the Court would remind them that they too must adhere to their own standards to guard against arbitrariness and insure equal protection in the appellate process. As will be discussed in Part II, this case also involves a Supremacy Clause violation which requires the Court's review.

Aside from the constitutional aspects, this case presents substantive matters which should be of grave concern to the Court. This situation represents a fraudulent attempt by an attorney creditor to collect an amount not owed to him together with interest thereon. Accordingly, there are concerns with creditor misconduct and consumer protection which go well beyond the parameters of this case.

With the economic meltdown in September of 2008, these types of problems have been brought to the forefront. Virtually every day, one hears about unscrupulous lending practices, excessive interest rates, fine print in credit agreements about which the consumer is unaware, fraudulent investment practices, and so forth. While Congress and the state legislatures must ultimately take the lead in addressing these problems, the Courts must also play a significant role in the protection of the economic rights of consumers when the opportunity arises. A decision in this case by the highest Court in the land would emphasize for the rest of the judicial system the importance of protecting the economic interests of the consumer.

This case further exemplifies the failure of a regulatory body to fulfill its regulatory responsibilities. Wisconsin Supreme Court Rule 10.01(2) provides for the governance of the State Bar of Wisconsin by the Wisconsin Supreme Court. Supreme Court Rule 20:8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Because of its supervisory responsibility, the Supreme Court should have reviewed this matter.

The current state of the economy stands as a grim reminder of the damage which can occur when regulatory bodies do not fulfill their supervisory responsibilities. In his column in the June 24, 2009 edition of *The Wall Street Journal*, Thomas Frank described the current situation as " . . . the most

wrenching financial disaster in decades, brought about in no small part by either the absence of federal regulation or the amazing indifference of the regulators." (Sec. A, p. 13, col. 1, lines 14-25) One can only wonder how many of the current problems on Wall Street could have been prevented if the regulatory agencies had done their jobs. When the regulators fail to regulate, however, the regulations themselves become meaningless. A decision by the Supreme Court herein will serve to remind regulatory bodies at all levels of the need to carry out their responsibilities.

This case represents an intersection of constitutional violations and substantive concerns which requires review by the Supreme Court. Mr. Morters will now outline the critical legal error which should have been corrected, the circumstances entitling him to relief, and the discriminatory treatment of him by the Wisconsin courts.

G. Uncorrected Legal Error

The trial court's analysis of the evidence was clouded by a flawed interpretation as to the legal status of the appellate fee judgment which was left uncorrected by the Wisconsin appellate courts. Throughout its decision, the Circuit Court characterized the appellate frivolity judgment either as a valid judgment or one which had not been vacated. On page 9 of the hearing transcript, the Court noted that the Supreme Court did not explicitly

vacate the trial court judgment. (App. J7) Judge Franke subsequently referred to the judgment as being at that point a valid judgment. (App. J13) The trial court portrayed Barr's behavior as an attempt to collect a judgment which should have been vacated. (App. J13) On page 18, the Court stated that the appellate frivolity judgment was never actually vacated. (App. J14) In the Court's view, the Supreme Court simply vacated the Court of Appeals' frivolity finding. (App. J14) Finally, on page 19, the trial court noted that the Court of Appeals did not vacate the June 20th judgment. (App. J14-15) The trial court consistently treated the appellate frivolity judgment as being a facially valid judgment. A review of Wisconsin law clearly shows that the trial court was wrong. *The judgment actually had been vacated and was invalid.*

The authority for an appellate frivolity award is derived from Sec. 809.25(3)(a) which provides, in relevant part, as follows:

> "If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section."

A reference to Sec. 809.01(4) establishes that the term "court" as used in Chapter 809 means the Court of Appeals or Supreme Court.

The plain language of Sec. 809.25(3)(a) vests the authority for an appellate frivolity award in the appellate courts and is consistent with Article VII,

Sec. 5(3), of the Wisconsin Constitution which gives the Court of Appeals appellate jurisdiction in the district as the legislature may provide by law. By virtue of Sec. 808.03, the legislature provided for both appeals as of right and appeals by permission. The plenary jurisdiction given to the circuit courts under Article VII, Sec. 8, is subject to the appellate and supervisory powers reserved by the Constitution to the Court of Appeals and the Supreme Court. See *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 550, 307 N.W. 2d 881 (1981) and *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429, 442, footnote 9, 531 N.W. 2d 606 (Ct. App. 1995). Thus, when the Court of Appeals made its appellate frivolity determination in its April 30, 2002 decision, it was acting pursuant to its authority under Sec. 809.25(3).

After finding an appeal to be frivolous, the Court of Appeals then remands the case to the trial court with directions to determine the amount of the appellate assessment. See *Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W. 2d 1 (Ct. App. 1998). A circuit court has no authority to award costs and fees for a frivolous appeal unless directed to do so by an appellate court. *Morters v. Aiken & Scoptur, S.C.*, 2006 WI App. 46, par. 8 & 14, 289 Wis. 2d 833, 712 N.W. 2d 71 (Ct. App. 2006). In accordance with the authority granted by the Court of Appeals, Judge

Moroney heard the assessment matter and granted judgment.

When the Wisconsin Supreme Court vacated the portion of the Court of Appeals' decision concerning appellate frivolity, the legal foundation for the $3,567.35 judgment disappeared. (App. E1-2) The net effect of the Supreme Court's order was to vacate the $3,567.35 judgment and render it void. There was no legal basis for the appellate frivolity judgment to stand independently.

On reconsideration, the Court of Appeals found the appeal was not frivolous but imposed penalties for appellate briefing deficiencies. (App. F2, 3, 6-11) By virtue of the stipulation and order in November of 2003, any potential obligation of Mr. Morters for appellate costs and fees was discharged. (App. G1-2)

The trial court was legally wrong in treating the $3,567.35 judgment as being facially valid and not vacated. Through a de novo review, this legal error should have been addressed and corrected.

H. Substantial Evidence of Malfeasance

When analyzed with the invalid status of the appellate judgment in mind, Mr. Morters' evidence clearly established malfeasance on the part of Barr and Croke. Barr personally dealt with the Bank's payoff request. (App. M1-2) In his payoff letter, *Barr identified himself as one of the judgment creditors.* (App. M1) His letter indicated that he reviewed the

Circuit Court Access printout, identified the judgments pertinent to Mr. Morters, and advised as to those which did not involve him. (App. M1-2) Barr listed the principal amount of each judgment separately, calculated interest due at 12% per annum, and arrived at individual totals as well as a combined total for all of the judgments. (App. M2) He provided a per diem figure and personally signed the letter. (App. M2) Barr never referred the Bank to Attorney Croke or provided an address for forwarding payment other than his own. (App. M1-2) Any reasonable person would construe the payoff letter as a request for payment. *Barr clearly represented he was owed $3,567.35 along with interest on a vacated judgment.*

In his February 7, 2008 letter of "explanation" to the Court, Barr asserted that he was merely trying to assist the Bank by calculating payoff amounts and stated that he had no financial interest in the matter. (App. O1-3) However, there was no assignment of the judgment on record which would have verified Barr's claimed lack of interest. It is extremely puzzling as to why Barr would spend considerable time and effort to compile a payoff statement for *judgments not owed to him.*

Attorney Croke's failure to correct the situation in November of 2007 is inexplicable. According to Barr's February 7, 2008 letter, he telephoned Croke when he was contacted by Associated Bank but did not hear back from Croke. (App. O2) Croke acknowledged receiving a copy of Barr's November 20, 2007 letter *but did nothing because it was not his*

place to become involved. (App. P2) TIG had not asked him to enforce the judgments, and he had no recollection of the status of the matter. (App. P2) Croke, however, negotiated the stipulation resolving the appellate fee matter and should have been concerned with the correct payoff. In view of his prior representation of TIG at the trial court and appellate levels, and in responding to two petitions for certiorari to the United States Supreme Court,[5] Croke should have remembered the events of this case. Surprisingly, the trial court failed to consider Croke's unusual behavior. (App. J1-16)

According to Wisconsin Jury Instructions – Civil, No. 2804, a *conspiracy may be proved by indirect or circumstantial evidence* which is " . . . the proof of a chain of circumstances pointing to the existence or non-existence of certain facts." An unlawful conspiracy can be established " . . . *by what the parties did, not necessarily by what they said*." Wisconsin Jury Instructions – Civil, No. 2804. [Emphasis added] See also *American Tobacco Co. v. United States*, 328 U.S. 781, 809-810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946). Wisconsin Jury Instructions – Civil, No. 2806, indicates that *all of the acts and events* are to be viewed as a whole in determining the existence of a conspiracy. One who acquiesces in an illegal scheme is as much a conspirator as one who creates it. Wisconsin Jury Instructions – Civil, No.

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[5] Nos. 03-369 and 04-1621

2802. The totality of Barr and Croke's actions clearly established a conspiracy to defraud Mr. Morters, but the trial court's erroneous interpretation regarding the status of the appellate fee judgment prevented it from recognizing such malfeasance.

I. Extraordinary Circumstances Justifying Relief

In Matter of Estate of Smith, 82 Wis. 2d 667, 672-673, 264 N.W. 2d 239 (1978), the Supreme Court characterized Sec. 806.07(1)(h) as a catch-all provision for relief. According to *Conrad*, cited earlier, subsection (h) is to be liberally construed to allow relief from judgments whenever appropriate *to accomplish justice*. *Conrad*, 92 Wis. 2d at 418. Even if a situation may give rise to a claim for relief under Sec. 806.07(1)(a), (b), or (c), subsection (h) permits the granting of relief if extraordinary circumstances are present. *State ex rel. M.I.B. v. D.G.H.*, 122 Wis. 2d 536, 550, 363 N.W. 2d 419 (1985).

Without question, the behavior herein constitutes fraud, misrepresentation, and misconduct within the meaning of Sec. 806.07(1)(c). Because the case involves creditor misconduct by an attorney, extraordinary circumstances are present which mandate relief under Sec. 806.07(1)(h). As discussed earlier, creditor misconduct is a serious problem in this Nation. When there is fraudulent behavior by a creditor, the public interest in protecting the consumer demands that such behavior be treated as

extraordinary. Furthermore, the situation becomes even more extraordinary when the fraud is perpetrated by an attorney who is an "officer of the court" pursuant to Wisconsin Supreme Court Rule 10.02(1). Since the Wisconsin Supreme Court governs the State Bar of Wisconsin, fraudulent conduct by one of its officers should be considered as an extraordinary circumstance per se.

When evaluating Sec. 806.07(1)(h) motions, the Wisconsin courts have previously given serious treatment to fraudulent conduct with respect to the initial procurement of an original judgment. See *M.L.B.*, 122 Wis. 2d at 544 & 558 and *State v. Ronnie J.*, 2004 WI App. 58, par. 14, 16 & 21, 271 Wis. 2d 242, 677 N.W. 2d 684 (Ct. App. 2004). *State v. Sprosty*, 2001 WI App. 231, 248 Wis. 2d 480, 636 N.W. 2d 213 (Ct. App. 2001), review denied 2002 WI 2, 249 Wis. 2d 581, 638 N.W. 2d 590 (2002) provided precedent for using Sec. 806.07(1)(h) to grant relief from a previously valid adjudication due to subsequent misconduct by an opposing party. Had the Wisconsin appellate courts afforded Mr. Morters the de novo review to which he was legally entitled, the extraordinary nature of the behavior herein would have been readily apparent.

J. Discriminatory Treatment of Mr. Morters

The Court of Appeals' failure to conduct a de novo review and the Supreme Court's refusal to rectify this

deprivation of due process is unfortunately consistent with the pattern of discriminatory treatment Ronald has endured throughout this litigation. By virtue of his previous petitions for certiorari, the United States Supreme Court has seen these violations of due process and equal protection of law.

In No. 03-369, the Supreme Court was presented with the deprivation of appellate due process and equal protection surrounding Mr. Morters' original appeal from the $10,000.00 trial court frivolity judgment. When he appealed from this determination, Ronald presented numerous trial court errors. Rather than conducting the requisite de novo review, the Wisconsin Court of Appeals affirmed on the basis of "reasoning" which consisted of one paragraph of conclusory assertions. The Wisconsin Supreme Court refused to rectify this constitutional violation. On November 17, 2003, the United States Supreme Court denied certiorari.

Following the denial of certiorari, Mr. Morters realized that he had been improperly advised to sue Barr. Based on this improper advice and other grounds, Ronald moved for relief from the $10,000.00 judgment pursuant to Sec. 806.07(1)(h). In adjudicating the motion, the trial court failed to address the grounds for relief in accordance with the case law standards set forth in *M.L.B.* for the evaluation of Sec. 806.07(1)(h) motions. Both the Court of Appeals and the Wisconsin Supreme Court were unconcerned with this failure to afford due process. Mr. Morters brought this matter to the

attention of the Supreme Court in No. 04-1621, but certiorari was denied.

A deprivation of due process occurred as well in Mr. Morters' litigation against other former attorneys who had represented him in his personal injury action. In *Morters v. Aiken & Scoptur, S.C.*, cited earlier, these former attorneys sought an appellate fee award against him which was impermissible under the law. *Morters*, 2006 WI App. at par. 1, 6, 8-15. Although the trial court granted the award, Mr. Morters successfully obtained appellate relief reversing it. *Morters*, 2006 WI App. 46 at par. 1, 6, 8-15. However, his efforts to have these attorneys sanctioned for making the request proved unsuccessful. *Morters*, 2006 WI App. 46 at footnote 4. Mr. Morters requested review of this denial of due process in No. 06-322, but the United States Supreme Court denied certiorari on October 30, 2006.

With this latest episode, the Supreme Court has now seen four occasions demonstrating the Wisconsin appellate courts' lack of concern for deprivations of due process at either the appellate or trial court levels. Although Wisconsin has developed uniform adjudicative standards, they have not been applied by the courts in an equal manner. The invidious nature of this discrimination may best be seen by examining the protective treatment afforded to Ronald's former attorneys. Barr was originally sued due to his failure to follow Ronald's instructions to obtain a jury trial. The action was found to be frivolous primarily

because the Court determined Barr's conduct was not causal of injury. Wisconsin Supreme Court Rule 20:1.2(a) requires an attorney to abide by his client's decision as to the course of the litigation. Despite this blatant violation of the rules of professional conduct, Mr. Morters was penalized $10,000.00. *Barr and TIG, however, escaped sanction for an obvious attempt to collect a void judgment along with interest thereon.*

In *Morters v. Aiken & Scoptur,* these attorneys presented an erroneous legal position to obtain an appellate award. Although successful in obtaining reversal of the award, Mr. Morters was not given the opportunity to pursue frivolity sanctions against these attorneys. It appears that attorneys receive full legal protection while lay persons do not.

K. Summary

Wisconsin law provides litigants with an appeal as of right and a de novo review of legal questions. These principles insure equality, uniformity, and fairness in the appellate process. Mr. Morters' unconstitutional treatment by the Courts on appeal effectively abrogated his right to an appeal. The Supreme Court must not allow this deprivation of appellate due process and equal protection to stand.

II. THE WISCONSIN SUPREME COURT'S USE OF THE DISCRETIONARY REVIEW PROCESS TO AVOID REVIEWING THE CONSTITUTIONAL VIOLATION THEREIN VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

By virtue of Article VII, Secs. 3(2) and (3), of the Wisconsin Constitution and Secs. 808.10 and 809.62 of the Wisconsin Statutes, Wisconsin has created a system of discretionary review of decisions of the Wisconsin Court of Appeals by the Wisconsin Supreme Court. This discretion allows the Court to concentrate on cases presenting "special and important reasons." Wisconsin Statutes, Sec. 809.62(1r). In recognition of the importance of constitutional questions, *Sec. 809.62(1r)(a) lists the presence of real and significant questions of federal or state constitutional law as being one of the criteria for review.* Unfortunately, Sec. 809.62(1r) does not make the presence of constitutional questions a controlling criterion for the granting of review.

By failing to correct the constitutional violations described in Part I, the Wisconsin Supreme Court not only violated the Due Process and Equal Protection Clauses but also offended the Supremacy Clause contained in Article VI of the United States Constitution. Under the Supremacy Clause, the Constitution shall be the supreme law of the land and the judges in every State shall be bound by it notwithstanding anything in the constitution or laws of any State contrary thereto. Early in our Nation's

history, the Supreme Court emphasized the supremacy of the Constitution. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-341, 4 L. Ed. 97 (1816), the Supreme Court reiterated the Constitution as being the supreme law of the land and the obligation of the state courts to comply with it. The Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426, 4 L. Ed. 579 (1819) noted that " . . . the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States and cannot be controlled by them." Another early statement of Constitutional supremacy was seen in *Dodge v. Woolsley*, 59 U.S. (18 How.) 331, 348-349, 15 L. Ed. 401 (1856).

In *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 346-347, 55 S. Ct. 758, 79 L. Ed. 1468 (1935), the Court noted that all statutes must conform to the Constitution since it is the supreme law of the land. According to *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958), the interpretation of the Fourteenth Amendment by the Supreme Court is the supreme law of the land, and Article VI makes it binding on the States. The Court in *Cooper* emphasized the solemn duty by virtue of their oaths of every state legislator, executive, and judicial officer to support the Constitution. *Cooper*, 358 U.S. at 18. In *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974), the Supreme Court reaffirmed that no state law is above the Constitution. Citing *McCulloch*'s discussion of supremacy, the Court in *Maryland v. Louisiana*, 451

U.S. 725, 740, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981) and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) noted that state law which conflicts with the Constitution and federal law is without effect.

While the Wisconsin Court of Appeals certainly violated the Supremacy Clause by failing to provide appellate due process, the ultimate responsibility for this violation must lie with Wisconsin's highest court. Because it declined to review the due process and equal protection violations herein, the Wisconsin Supreme Court *elevated its discretionary authority* under Secs. 808.10 and 809.62 *over the Constitution.* Although required to defend the Constitution by virtue of its oath of office, the Supreme Court abused its discretionary authority and failed to fulfill its solemn duty. This situation exemplifies how a law which is nondiscriminatory on its face can be applied in an unconstitutional manner. The unconstitutional application of Wisconsin's discretionary review law, however, threatens the constitutionality of the entire law if left unchecked.

The use of discretionary review to avoid addressing constitutional violations offends the Supremacy Clause and requires the Court's immediate attention. In his supremacy discussion in *McCulloch*, Chief Justice Marshall deduced the proposition that a power to create implies a power to preserve. *McCulloch*, 17 U.S. at 426. This case clearly involves Constitutional preservation. The Supreme Court must now preserve constitutional supremacy

by granting certiorari to remind all State courts of the need to grant review in cases raising constitutional violations. In *Cooper*, the Supreme Court warned that the Constitution would become a solemn mockery if the state legislatures at will could destroy rights acquired pursuant to federal judgments. *Cooper*, 358 U.S. at 18. The Court must not permit the discretionary review process to make a canard of the protections under the Fourteenth Amendment.

CONCLUSION

In her recent re-election campaign advertisements, the Chief Justice of the Wisconsin Supreme Court, Shirley S. Abrahamson, indicated that she would protect family values. The most important element in the protection of family values, however, is upholding the people's rights to due process of law and equal protection under the law. Judges throughout this Nation swear to protect and defend the Constitution of the United States, and the Wisconsin appellate courts have failed to defend Mr. Morters' constitutional rights. It is extremely troubling that not one of the seven members of the Wisconsin Supreme Court recognized this constitutional violation and voted to grant review.

According to a summary of constitutional law by West Publishing Company in The Reader's Digest Association, Inc., *Reader's Digest Family Legal Guide* (1981), p. 195, the primary purpose of a constitution

is to protect the rights of individuals and minorities against the arbitrary actions of those in authority. In *The Federalist No. 51*, p. 349 (J. Cooke ed. 1961) (J. Madison), James Madison recognized the need for a system of governmental checks and balances so that government could control itself. As the highest court in the land, the United States Supreme Court serves as the ultimate "check and balance" in the legal system to protect the constitutional rights of individuals, such as Mr. Morters, from being violated.

Admittedly, this case is not a high profile matter as, for example, the recent case of *FCC v. Fox Television Stations, Inc.*, 556 U.S. ___, 129 S. Ct. 1800, 1808-1810, 173 L. Ed. 2d 738 (2009) which concerned indecent utterances in broadcasts aired by Fox and the adequacy of the Commission's ex planation of its decision regarding same. However, the harm presented in this low profile case is far greater than that in *Fox*. Parents can protect their children from the indecent utterances of foul-mouthed celebrities from Hollywood by exercising control over their televisions. Persons entitled to due process and equal protection in the legal system are irreparably harmed if the institutions upon which they rely to guarantee these rights fail their oaths of office.

By failing to rectify the Court of Appeals' error, the Wisconsin Supreme Court has sanctioned a departure from Wisconsin's uniform standards of appellate review and a deprivation of Mr. Morters' Fourteenth Amendment rights to due process of law

and equal protection under the law. The Court has also violated the Supremacy Clause by elevating the exercise of its discretionary authority under Sec. 809.62 over the Constitution of the United States. As the ultimate guardian of Constitutional rights, it now becomes the responsibility of the United States Supreme Court to remedy these violations by granting certiorari in this case. A decision herein will not only benefit Mr. Morters but will protect the rights of appellate litigants in other jurisdictions and insure that the Constitution remains the supreme law of the land. Finally, the Court can strike a much needed blow for consumer protection by granting certiorari. For the reasons recited in this petition, Ronald W. Morters' petition for writ of certiorari should be granted and it is respectfully requested that the Court grant the same.

Dated at Big Bend, Wisconsin, this 28 day of July, 2009.

Respectfully submitted,

LEONARD W. SCHULZ
Counsel of Record
Wisconsin State Bar No.
01009922

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Telephone: (262) 662-3100
Attorney for Petitioner,
Ronald W. Morters

APPENDIX A

COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1147

STATE OF WISCONSIN

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. Nos. 1999CV5303
2000CV1705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

v.

CHARLES H. BARR AND TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF,

v.

CHARLES H. BARR AND TIG INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Ronald W. Morters appeals from that portion of the order of the circuit court that denied his motion to set aside a judgment for frivolous costs in the amount of $10,000. He argues that the circuit court erred when it refused to vacate the judgment under WIS. STAT. § 806.07 (2005-06).[1] Because we conclude that the circuit court properly concluded that Morters was not entitled to have the judgment set aside, we affirm.

¶2 This case has a long history. It began when Morters, his wife and granddaughter brought a personal injury action in Waukesha County. They were represented in that case by the respondent in this appeal, Charles H. Barr. Barr had the matter mediated. As a result of the mediation, the Morters were offered the equivalent of a $771,000 jury verdict. The Morters rejected the offer, fired Barr, and hired another law firm to represent them. This law firm stipulated to the case being decided by arbitration. The Morters were unhappy with this decision, fired the second law firm, and hired a third attorney. Ultimately, the Morters went to arbitration and the arbitrator decided that the Morters were entitled to approximately $500,000. Ronald Morters then challenged the

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

motion filed by his first two attorneys to have their fees taken out of the settlement. The circuit court ruled that the Morters did not have just cause to fire the attorneys and that they were entitled to their fees.

¶3 Morters and his granddaughter then brought separate actions against Barr and his insurer, TIG Insurance Company, for professional negligence and breach of contract. The trial court ultimately dismissed all of Morters's claims. Barr and TIG then brought a motion arguing that the suit had been frivolous and asking for costs and attorneys' fees. Morters appealed the dismissal.

¶4 This court affirmed the dismissal and found the appeal to be frivolous. ***Morters v. Barr***, No. 2001AP2011, unpublished slip op. (Apr. 30, 2002). We remanded to the circuit court for a determination of the amount of costs on appeal. The court awarded $3567.35 in costs against Morters. The supreme court reversed our determination that the appeal was frivolous.[2] While the frivolous appeal costs matter was pending in the supreme court, the circuit court assessed Morters an additional $10,000 in costs for

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[2] By an order dated October 21, 2002, the supreme court granted a petition for review with respect to the issue of whether the appeal was frivolous, vacated our decision that it was frivolous, and remanded it to this court solely for reconsideration of whether the appeal was frivolous. Upon reconsideration, we determined that the appeal was not frivolous, but awarded the respondents all costs and fees. ***Morters v. Barr***, No. 2001AP2011, unpublished slip op. (WI App Jan. 14, 2003).

frivolousness at trial. Morters again appealed, and this judgment was affirmed.

¶5 In 2007, Morters attempted to refinance his home. He was informed that there were outstanding judgments against him, including the $3567.35 and $10,000 judgments. Morters asked the bank to obtain a payoff letter from Barr. Barr responded saying that Morters owed three judgments, including the two at issue in this appeal. A copy of Barr's letter was forwarded to TIG's attorney, William Croke, the attorney for respondents here. Attorney Croke did not respond to the letter.

¶6 Morters then brought a motion in the circuit court to be relieved from these two judgments. Morters argued that the $3567.35 judgment had been set aside by the supreme court. He further argued that because of this judgment, he had been unable to refinance his house. Consequently, he asked that he be relieved of the $10,000 judgment because he believed that Barr's action was "a calculated attempt to collect what he knew was not owed to him."

¶7 At the hearing on the motion, the circuit court granted the portion of the motion that vacated the $3567.35 judgment. As to the $10,000 judgment, the court questioned whether it had the authority to grant relief from an otherwise valid judgment based on a party's bad actions. For the purpose of the motion, however, the court assumed it had the authority to do so, and denied the motion. The court found that Morters had not established any malfeasance by Barr.

¶8 Morters argues to this court that the $10,000 judgment should be set aside under WIS. STAT. § 806.07(1)(h). That section provides that the court may relieve a party from judgment for any reasons "justifying relief from the operation of the judgment." ***Id.*** Whether to grant relief from judgment under this section is a discretionary determination for the circuit court. ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, ¶5, 305 Wis. 2d 400, 740 N.W.2d 888. The statute gives the court "'broad discretionary authority and invokes the pure equity power of the court.'" ***Id.***, ¶6 (citation omitted). To determine whether relief is warranted, the circuit court must assume the allegations of the motion are true. ***Id.*** The circuit court must hold a hearing if the facts are so extraordinary or unique as to warrant relief. ***Id.*** After holding a hearing, the decision whether to grant relief is within the circuit court's discretion. ***Id.***

¶9 In this case, the circuit court held a hearing. The court first noted that it questioned whether it had the authority to impose what amounted to a sanction by vacating an otherwise valid judgment because a party had misbehaved in some respect. The court assumed for the purposes of the motion that it did. The court then determined that Morters had not established that Barr and his attorney acted with the intent to collect on what they knew was a bad debt. The court found that while Barr's actions may have been suspicious to Morters, there was "nothing close to evidence here that he was acting in bad faith." The court concluded that the burden was on the plaintiff

to raise more than a suspicion, and the plaintiff had not met that burden.

¶10 Based on this record, we conclude that the circuit court followed the proper procedure and appropriately exercised its discretion when it denied the motion. Consequently, we affirm the order of the circuit court.

By the Court. – Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX B

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and TIG INSURANCE COMPANY,

Defendants.

Case No.: 99-CV-005303
Case Code: 30703

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and TIG INSURANCE COMPANY,

Defendants.

Case No.: 99-CV-001705
Case Code: 30703

FINAL ORDER

(Filed Apr. 17, 2008)

The motion of the plaintiff, Ronald W. Morters, brought pursuant to Wisconsin Statutes, Sec. 806.07(1), for an order setting aside and nullifying the judgment in the amount of $3,567.35 for appellate costs entered on June 20, 2002 in favor of the defendants, Charles H. Barr and TIG Insurance Company, and against

the plaintiff, Ronald W. Morters, and for an order setting aside and nullifying the judgment in the amount of $10,000.00 for trial court frivolity costs entered on July 29, 2002 in favor of the defendants, Charles H. Barr and TIG Insurance Company, and against the plaintiff, Ronald W. Morters, having come on for hearing before the Court, the Honorable John A. Franke, Circuit Judge, presiding, on the 1st day of April, 2008, and the plaintiff, Ronald W. Morters, having appeared in person and by Attorneys Leonard W. Schulz and Gregory K. Miller, and the defendants, Charles H. Barr and TIG Insurance Company, having appeared by Attorney William P. Croke;

NOW, THEREFORE, IT IS ORDERED as follows:

1. That the portion of the plaintiff's motion for an order setting aside and nullifying the $3,567.35 judgment be and is granted, that the $3,567.35 judgment be and is set aside and nullified, and the Clerk of Courts is directed to remove this judgment from the judgment docket;

2. That the portion of the plaintiff's motion for an order setting aside and nullifying the $10,000.00 judgment be and is denied.

THIS ORDER IS FINAL FOR THE PURPOSES OF APPEAL.

Dated at Milwaukee, Wisconsin, this 17th day of April, 2008.

BY THE COURT

/s/ John Franke
John A. Franke
Circuit Judge

APPENDIX C

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

RONALD W. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

CASE NO. –
99-CV-005303

CASE CODE NO. –
30703

SHANNON L. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

CASE NO. –
99-CV-001705

CASE CODE NO. –
30703

JUDGMENT IN FAVOR OF DEFENDANTS, CHARLES H. BARR AND TIG INSURANCE COMPANY and AGAINST RONALD W. MORTERS

(Filed Jun. 20, 2002)

Pursuant to the Order for Judgment on file granting the motion of the defendants, Charles H. Barr and TIG Insurance Company, for frivolous

claims costs pursuant to Sec. 814.025, Wis. Stats.; and the court having issued a written order that judgment be entered in favor of these defendants and against the plaintiff, Ronald W. Morters, in the sum of ~~Ten Thousand and 00/100 ($10,000.00) Dollars~~; [$3,567.35 (per signed order)].

NOW, THEREFORE, IT IS HEREBY ADJUDGED that Attorney Charles H. Barr and his professional liability insurer, TIG Insurance Company, shall have judgment against the plaintiff, Ronald W. Morters, in the amount of ~~Ten Thousand and 00/100 ($10,000.00) Dollars~~ [Three Thousand Five Hundred Sixty Seven and 35/100].

Judgment entered and docketed this 20th day of June, 2002, at 2:17 o'clock in the p.m., against Ronald W. Morters and in favor of the defendants, Charles H. Barr and TIG Insurance Company in the amount of ~~Ten Thousand and 00/100 ($10,000.00) Dollars~~ [Three Thousand Five Hundred Sixty Seven and 35/100].

BY THE COURT

BY THE COURT
JOHN BARRETT
CLERK OF
CIRCUIT COURT

By: /s/ Mary [Illegible]
Judgment Clerk
JUDGMENT CLERK

APPENDIX D

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

RONALD W. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

CASE NO. –
99-CV-005303

CASE CODE NO. –
30703

SHANNON L. MORTERS,

Plaintiff,

-vs-

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

CASE NO. –
99-CV-001705

CASE CODE NO. –
30703

JUDGMENT IN FAVOR OF DEFENDANTS, CHARLES H. BARR AND TIG INSURANCE COMPANY and AGAINST RONALD W. MORTERS

(Filed Jul. 29, 2002)

Pursuant to the Order for Judgment on file granting the motion of the defendants, Charles H. Barr and TIG Insurance Company, for frivolous

claims costs ~~pursuant to Sec. 814.025, Wis. Stats.~~ [not per signed order]; and the court having issued a written order that judgment be entered in favor of these defendants and against the plaintiff, Ronald W. Morters, in the sum of Ten Thousand and 00/100 ($10,000.00) Dollars,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that Attorney Charles H. Barr and his professional liability insurer, TIG Insurance Company, shall have judgment against the plaintiff, Ronald W. Morters, in the amount of Ten Thousand and 00/100 ($10,000.00) Dollars.

[Judgment entered and docketed JUL 29 2002]

BY THE COURT
JOHN BARRETT
CLERK OF
CIRCUIT COURT

By: /s/ Diane Gawronski
JUDGMENT CLERK

APPENDIX E

[SEAL] **OFFICE OF THE CLERK**

SUPREME COURT OF WISCONSIN

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
WEB SITE: WWW.COURTS.STATE.WI.US

October 21, 2002

To:

Hon. John A. Franke
Milwaukee County
Circuit Court
Criminal Justice Facility
949 N. Ninth Street
Milwaukee, WI 53233

John Barrett
Milwaukee County Clerk
of Courts
Appeals Processing Division
901 N. Ninth Street,
Room G-8
Milwaukee, WI 53233

William P. Croke
Quale-Feldbruegge
Law Firm
710 N. Plankinton Avenue
Milwaukee, WI 53203

Leonard W. Schulz
Law Offices of
Leonard W. Schulz
P.O. Box 238
Big Bend, WI 53103-0238

You are hereby notified that the Court has entered the following order:

Morters v. Barr

No. 01-2011 L.C. #s 99CV5303, 00CV1705

A petition for A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioners, Ronald W. Morters and Shannon L. Morters, and considered by this court;

IT IS ORDERED that the petition for review is granted solely with respect to the issue of whether the appeal was frivolous.

IT IS FURTHER ORDERED that the court of appeals' decision is vacated solely as it deemed the appeal to be frivolous.

IT IS FURTHER ORDERED that the case is remanded to the court of appeals solely for reconsideration of whether the appeal was frivolous. The court is directed to make specific findings as required by § (Rule) 809.25(3)(c).

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX F

COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2011

STATE OF WISCONSIN

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. Nos. 99CV5303 &
00CV1705

IN COURT OF APPEALS
DISTRICT I

RONALD W. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

SHANNON L. MORTERS,

PLAINTIFF-APPELLANT,

V.

CHARLES H. BARR AND TIG INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and orders, of the circuit court for Milwaukee County: JOHN A. FRANKE and DENNIS P. MORONEY, Judges.[1] *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. This case comes before us on remand from the supreme court. On October 21, 2002, the supreme court issued an order granting the petition for review in the case of ***Morters v. Barr***, 2002 WI App 134, 255 Wis. 2d 833, 646 N.W.2d 855, solely with respect to the issue of frivolousness. The supreme court also vacated our decision with respect to that issue and directed us to reconsider whether the issue was frivolous, and to make specific findings as required by WIS. STAT. RULE 809.25(3)(c) (1999-2000).[2]

¶2 Upon reconsideration, we conclude that the appeal is not frivolous pursuant to WIS. STAT. RULE 809.25(3)(c), because we cannot conclude that the entire appeal is frivolous as required by ***Nichols v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994). However, as our initial alarm was with the complete lack of substance in the appellants' brief, we further conclude that the appellants' brief

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[1] Judge John A. Franke presided over all the motions and trial, except the motion for frivolous costs. Judge Dennis P. Moroney decided the frivolous costs motion.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

failed to comply with the requirements of WIS. STAT. RULE 809.19, and accordingly, award the respondents all costs and fees on appeal, including attorney fees, pursuant to WIS. STAT. RULE 809.83(2).

I. BACKGROUND.

¶3 Ronald Morters was involved in a multi-car accident when a driver crossed the centerline during a snowstorm and hit his automobile. His wife, Ann, who was following him in a separate automobile, was unable to stop and struck him from behind. Shannon Morters, their granddaughter, was a passenger in Ann's car. All three of the Morters were injured, with Ronald having the most serious injuries. The Morters and their granddaughter hired Charles Barr as their attorney to commence lawsuits as a result of the accident.

¶4 Barr filed suits on behalf of the Morters against the driver who had caused the accident, but before a trial could be held, the parties mediated the case. At the mediation session, the other driver's insurance company offered $575,000 to settle all three cases. In addition, at mediation, the subrogated health insurance carrier agreed to reduce its claim and Barr agreed to reduce his fee so that the offer was equivalent to a $771,000 jury verdict. The Morters rejected the offer, dismissed Barr as their attorney, and hired another law firm. The new law firm stipulated to the cases being decided by arbitration. Unhappy with the decision to arbitrate, the Morters fired the new law firm and hired a third

attorney to represent them. At the Morters' direction, this new attorney filed a motion to relieve the Morters from the stipulation sending their cases into arbitration, but later they changed their minds again and chose to proceed with the arbitration, resulting in the dismissal of their cases. The arbitrator determined that the Morters were entitled to only $557,384.17.

¶5 Ronald Morters then challenged the motion filed by his first two attorneys requesting that their legal fees be paid out of the settlement. The trial court ruled that the Morters did not have just cause to discharge Barr or the second law firm, and that these attorneys were entitled to their fees out of the arbitration award.

¶6 Morters and his granddaughter then started legal malpractice suits against Barr,[3] claiming that Barr had a conflict of interest in representing all three Morters; that his actions deprived them of a jury trial; and that he had failed to demand the policy limits or file a statutory offer to settle. During the pendency of this action, the trial court consolidated the two lawsuits over the objections of the Morters, granted partial summary judgment to the respondents, and granted a motion in limine brought by the respondents. Later, the trial court directed a verdict for the respondents at the close of the Morters' case-in-chief.

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[3] Ronald's wife, Ann, died before either suit was filed.

¶7 Ronald and Shannon Morters then appealed both the order granting partial summary judgment and a later judgment entered in the respondents' favor. The Morters complained that the trial court: (1) erroneously exercised its discretion in consolidating their two cases; (2) erred in granting partial summary judgment; (3) erroneously exercised its discretion in granting a motion in limine; and (4) erred in directing a verdict for the respondents. The respondents had also filed a motion requesting frivolous costs on appeal. We affirmed the trial court in all respects. We also ruled that the appeal was frivolous, and remanded the matter to the trial court for a determination of frivolous costs on appeal.

¶8 On May 28, 2002, the Morters filed a petition for review with the supreme court. On October 21, 2002, the supreme court: (1) granted the petition for review solely with respect to the issue of whether the appeal was frivolous; (2) vacated this court's decision solely as to the issue of frivolousness; and (3) remanded the matter to this court for reconsideration of whether the appeal was frivolous.

II. ANALYSIS

¶9 An appeal can be found frivolous if the party or the attorney for the party knew or should have known that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2; *see also* ***Stern v. Thompson & Coates,***

Ltd., 185 Wis. 2d 220, 240-41, 517 N.W.2d 658 (1994). However, to award attorney fees for a frivolous appeal, this court must conclude that the entire appeal is frivolous. ***Nicholas v. Bennett,*** 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994).

¶10 "The question of whether a reasonable attorney and litigant would or should have concluded that a particular claim is without a reasonable basis in law or equity presents a mixed question of law and fact and not a question of fact alone." ***State v. State Farm Fire & Cas. Co.,*** 100 Wis. 2d 582, 601, 302 N.W.2d 827 (1981). "When mixed questions of law and fact are presented to this court, there are really two component questions which must be answered. The first question is what, in fact, actually happened; the second question is whether those facts, as a matter of law, have meaning as a particular legal concept." ***Department of Revenue v. Exxon Corp.***, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979).

¶11 The respondents have asked us to award attorney fees for this appeal under WIS. STAT. RULE 809.25(3). While at least two of the appellants' arguments in this appeal may be frivolous, and have been delineated as such by the trial court, we cannot conclude that the entire appeal is frivolous.[4] Because, we

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[4] In a decision and order dated October 18, 2001, the trial court concluded that a number of the Morters' claims were frivolous. We conclude that the "arguments" to this court concerning the trial court's grant of summary judgment and a directed verdict are no more than the re-hashing of a number of claims that the trial court has already concluded are frivolous. However,

(Continued on following page)

have no authority to find individual arguments in a brief frivolous, *see* ***Nichols***, 190 Wis. 2d at 365 n.2, we conclude that the appeal is not frivolous.

¶12 However, this leads us back to our original problem with the Morters' appeal. The appellants' brief contains no specificity of argument other than general assertions of error and long recitations of the law. Therefore, we conclude that the appellants' brief fails to satisfy WIS. STAT. RULE 809.19(1)(e), which requires:

> An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

¶13 Simply stated, the appellants' brief fails to set forth an "argument." An argument is defined as "a coherent series of reasons, statements, or facts intended to support or establish a point of view." WEBSTER'S THIRD NEW INT'L DICTIONARY 117 (unabr. 1993). In terms of a legal argument, this definition necessarily includes some analysis of the law and the

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because we cannot conclude that Morters' remaining two claims are without *any* reasonable basis, we have no authority to find the entire appeal frivolous. *See* ***Nichols v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994).

facts of the case as well as an explanation of how the law as applied to those facts yields a certain desired result. In contrast to these requirements, each of the appellants' arguments consists primarily of two pages of block quotation of the law, preceded by one or two vague and directionless sentences concerning the appellants' case. In all, the appellants' argument lasts thirteen pages, but approximately eight of those pages are comprised entirely of cases block-quoted *en masse*.

¶14 We recognize that it is unreasonable to expect every attorney in Wisconsin to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs in order to give some life to the requirements of WIS. STAT. RULE 809.19. The appellants' brief falls short of the mark – the brief was apparently thrown together by making a number of general claims of error and then quoting two pages of law that may or may not be relevant to the case at hand.[5] Thus, we conclude that the brief failed to provide

---

[5] The appellants' brief is even more troubling in light of the trial court's conclusion that the Morters' negligence claims were frivolous. Despite this ruling and the presumption that "if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal," *see* ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990), in the argument sections concerning summary judgment and directed verdict, the appellants simply reiterate their belief that the trial court was incorrect; they fail to offer a reasoned analysis to overcome this presumption.

"[a]n argument" including "the contention of the appellant [and] the reasons therefor," as required by WIS. STAT. RULE 809.19(1)(e).

¶15 We also pause to note that in filing the brief, the attorney for the appellants certified that he had complied completely with WIS. STAT. § 802.05(1)(a), which provides:[6]

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. . . .
>
> If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion, or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order

---

[6] WISCONSIN STAT. RULE 809.84 provides: "An appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result."

> to pay the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

The case law is clear with respect to every argument at issue. Under current law, the relief sought by the appellants is not well-grounded or warranted. Without adequate argument seeking an extension, modification or reversal of existing law, appellate counsel has also failed to satisfy the requirements of § 802.05(1)(a).

¶16 Because the appellants' brief fails to satisfy the requirements of WIS. STAT. RULE 809.19, we award the respondents costs and fees, including attorney fees, pursuant to WIS. STAT. RULE 809.83.[7] Accordingly, we remand this matter to the trial court for a determination of costs and fees on appeal.

By the Court. **– Judgments and orders affirmed and cause remanded with directions.**

---

[7] WISCONSIN STAT. RULE 809.83(2) holds the sanction for a violation of WIS. STAT. RULE 809.19 and states, in relevant part: "Failure of a person to comply with a court order or with a requirement of these rules . . . is grounds for dismissal of the appeal, summary reversal, striking of a paper, *imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.*" (Emphasis added.)

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX G

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

RONALD W. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No.: 99-CV-005303
Case Code: 30703

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No.: 00-CV-001705
Case Code: 30703

STIPULATION AND ORDER

(Filed Nov. 25, 2003)

IT IS STIPULATED AND AGREED, by and between the plaintiff, Ronald A. [sic] Morters, and the defendants, Charles H. Barr and TIG Insurance Company, that there is no claim against the plaintiff, Ronald A. [sic] Morters, for frivolous claims costs due to an alleged frivolous appeal.

Dated this 19 day of Nov, 2003.

/s/ Ronald W. Morters
Ronald A. Morters, Plaintiff

Dated this 18th day of November, 2003.

QUALE, FELDBRUEGGE,
CALVELLI, THOM & CROKE, S.C.

By: /s/ William P. Croke
William P. Croke
State Bar No. – 1012156
Attorneys for Defendants

ORDER

Upon the foregoing stipulation of the parties,

IT IS ORDERED that there is no claim against the plaintiff, Ronald A. [sic] Morters, for frivolous claims costs due to an alleged frivolous appeal.

Dated this 25th day of November, 2003.

BY THE COURT:

/s/ Dennis P. Moroney
Honorable Dennis P. Moroney
Circuit Court Judge

APPENDIX H

OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

[SEAL]

TELEPHONE (608) 266-1880
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To: May 13, 2009

Hon. John A. Franke
Milwaukee County
Circuit Court Judge
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Milwaukee, WI 53233

William P. Croke
von Briesen & Roper S.C.
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John Barrett
Milwaukee County Clerk
of Circuit Court
901 N. 9th Street,
Rm. G-8
Milwaukee, WI 53233

Ronald W. Morters
2755 Minot Lane
Waukesha, WI 53188

You are hereby notified that the Court has entered the following order:

No. 2008AP1147 *Morters v. Barr*
L.C. #s1999CV5303/2000CV1705

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Ronald W. Morters, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

David R. Schanker
Clerk of Supreme Court

APPENDIX I

United States Code

§ 1257. State courts; certiorari [Section a only]

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

* * *

United States Constitution

ARTICLE III

§ 2. Jurisdiction [paragraph 2 only]

* * *

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

ARTICLE VI

Debts; supremacy; oath [paragraph 2 only]

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

AMENDMENT I

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV. [Section 1 only]

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Constitution of the State of Wisconsin

Article I

§ 1. Equality; inherent rights

Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

* * *

§ 9. Remedy for wrongs

Section 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

* * *

Article VII

§ 3. Supreme court: jurisdiction

* * *

(2) The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction.

(3) The supreme court may review judgments and orders of the court of appeals, may remove cases

from the court of appeals and may accept cases on certification by the court of appeals.

* * *

§ 5. Court of appeals

* * *

(3) The appeals court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law, but shall have no original jurisdiction other than by prerogative writ. The appeals court may issue all writs necessary in aid of its jurisdiction and shall have supervisory authority over all actions and proceedings in the courts in the district.

Wisconsin Statutes

806.07 Relief from judgment or order.

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

* * *

808.03 Appeals to the court of appeals. **(1)** APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding, and that is one of the following:

(a) Entered in accordance with s. 806.06(1)(b) or 807.11(2).

(b) Recorded in docket entries in ch. 799 cases.

(c) Recorded in docket entries in traffic regulation cases prosecuted in circuit court if a person convicted of a violation may be ordered to pay a forfeiture.

(d) Recorded in docket entries in municipal ordinance violation cases prosecuted in circuit court.

* * *

808.10 Review by the supreme court. A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.

809.62 Rule (Petition for review).

* * *

(1m) GENERAL RULE; TIME LIMIT. A party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to s. 808.10 within 30 days of the date of the decision of the court of appeals.

(1r) CRITERIA FOR GRANTING REVIEW. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(a) A real and significant question of federal or state constitutional law is presented.

(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

* * *

APPENDIX J

STATE OF WISCONSIN MILWAUKEE COUNTY
: CIRCUIT COURT :
BRANCH 25

RONALD W. MORTERS,

Plaintiff,

-vs- Case No. 99-CV-5303

CHARLES H. BARR, et al.,

Defendants.

April 1, 2008

BEFORE THE HONORABLE
JOHN FRANKE

MOTION FOR RELIEF AND FOR LEAVE HEARING

APPEARANCES

LEONARD SCHULZ, Attorney-at-Law, appeared on behalf of the Plaintiff.

GREGORY MILLER, Attorney-at-Law, appeared on behalf of the Plaintiff.

WILLIAM PATRICK CROKE, Attorney-at-Law, appeared on behalf of the Defendants.

STEPHANIE SHOATE

OFFICIAL COURT REPORTER

[2] PROCEEDINGS

(Whereupon, the following proceedings began at 11:08 o'clock in the forenoon.)

THE CLERK: Case No. 99-CV-005303. Ronald Morters versus Charles Barr, et al. Appearances.

MR. SCHULZ: Good morning, Your Honor. Leonard W. Schulz appearing on behalf of Ronald Morters and Ronald Morters appearing in person.

MR. MILLER: Attorney Gregory K. Miller appearing with Attorney Schulz.

MR. CROKE: Attorney William Croke on behalf of the defendant.

THE COURT: I apologize for the delay in getting started on this. I tried to accommodate a motion that parties wanted heard before a real estate closing that may or may not go off as scheduled and the motion took longer than I thought.

This is here on Ronald Morters' Motion for Relief from two judgments as I understand it. One, a judgment in the amount of $3,567.35 entered June 20, 2002, relating [3] to appellate costs. Secondly, a judgment in the amount of $10,000 entered on July 29, 2002, that I believe was based on the trial court's finding that all or certain aspects of the case had been frivolous and that was an award of costs and fees in favor of the defendants. The basis for relief from the June 20 judgment is, as I understand it,

simply based on the Supreme Court's decision in this case that judgment should have been vacated, although it never was vacated.

MR. SCHULZ: That's correct, Your Honor.

THE COURT: The basis for the argument that the July 29 $10,000 judgment should be nullified is the claim that Mr. Morters should be excused from that judgment as a sanction for alleged misconduct by defendant Charles Barr in seeking to assert that June 20 judgment when Barr either knew or should have known that the judgment ought to have been vacated.

As indicated before we started, I had some substantial notes on the chronology of the proceedings that I have not been able [4] to locate. I think I recall the chronology reasonably well from reviewing what the parties have filed. I have not had the clerk retrieve the main court file. I've relied on the documents that the parties have submitted and the docket sheets that could be printed out.

As I understand it, the legal basis for the plaintiff's motion is 806.07(1)(h) which is a broad reason that allows a Court to relieve a party from judgment based on "any other reasons justifying relief from the operation of the judgment." Is that the legal basis for your request, Mr. Schulz?

MR. SCHULZ: Yes, Your Honor.

THE COURT: Anything you want to add in support of your motion? And just so the record is

clear, we've had some discussions on and off about whether there should be an evidentiary hearing. I've essentially left it up to the parties to decide whether they want to present evidence. And it's my understanding that you wish to argue this based on the written record that has been made; is that correct?

[5] MR. SCHULZ: Yes, Your Honor, with the addition of the Court taking judicial notice of the letter that Attorney Barr sent to the Court dated February 7, 2008, addressed to the deputy clerk, circuit court Branch 25 from Attorney Barr.

THE COURT: You want that be to treated as evidence?

MR. SCHULZ: Yes.

THE COURT: Any objection to that, Mr. Croke?

MR. CROKE: I guess I – I don't even have a copy. May I take a moment?

THE COURT: It's file stamped February 11. I have read it, but I wasn't certain as to whether it ought to be given any evidentiary weight.

(Whereupon, Mr. Croke views the document.)

MR. CROKE: Judge, I don't care.

THE COURT: All right. I will consider it to be a part of the record that I may rely on in resolving

the motion. Mr. Schulz, anything you want to add in argument?

[6] MR. SCHULZ: Yes, Your Honor. The facts of this motion are the background of extremely acrimonious litigation that resulted in the unusual sanction of $10,000 in sanction for frivolous litigation in the trial court. The issue there is not going to be belabored here, but that sort of litigation creates animosity beyond the scope of normal litigation as everyone here knows.

Given that context, there was appellate submissions which resulted in the removal of *$4,500 in appellate – by the appellate court of sanctions for appellate briefing that was likewise accused of being frivolous and found not to be by the appellate courts. The Court directed that the 3,500 judgment be vacated. It never was. It continues to be of record, as far as I know, to this present day. In addition, there was –

THE COURT: Before you get too far from that, since this may be a critical point, I'm looking for exactly what the Supreme Court did say. I don't recall that they ordered that it be vacated. That may [7] have been clearly implicit in the ruling. I believe the Supreme Court's decision that's at issue is attached here somewhere.

MR. SCHULZ: Your Honor, we have a copy of the decision of the Supreme Court before us dated October 21, 2002. In the third paragraph and the second order, it says – and I quote, "It Is Further

Ordered that the Court of Appeals' decision is vacated solely as it deemed the appeal to be frivolous." I'd be happy to show it to the Court.

THE COURT: I believe I have it in my attachments here.

MR. SCHULZ: It's Exhibit D among our exhibits attached to the moving papers.

THE COURT: And what paragraph are you citing from?

MR. SCHULZ: On the first page of the second of directive "It Is Further Ordered." The opening paragraph, "a petition," etcetera, then first, "It Is Ordered" and then second, "It Is Further Ordered that the Court of Appeals' decision is vacated solely as it deemed the appeal to be [8] frivolous."

THE COURT: The judgment of $3,567, I'll call that the "June 20 judgment," wasn't that entered by the trial court though on a remand from the Court of Appeals to determine what the appellate costs were?

MR. MILLER: Yes, it was, Your Honor.

THE COURT: I've always sort of resented the fact that the Court of Appeals expects us to do that. They say they're not a fact finding Court so they can't do it and they let us try to figure out reasonable appellate costs. But that was a judgment that Judge Moroney would have entered.

MR. SCHULZ: Right.

THE COURT: And the timing of this got somewhat confusing because there were still other trial court motions pending. So the determination of the appellate costs was made by the trial court on June 20, and then a little over a month later, on July 29 of 2002, is when the trial court awarded the $10,000.

MR. MILLER: Your Honor, what essentially happened was the appeal went up on [9] the merits of the case and the appellate –

THE COURT: Pull the microphone over. This is Mr. Miller?

MR. MILLER: Yes. What happened was the appeal on the merits went up first. The trial court frivolity was still pending so that's why the timing – the actual appellate trial court frivolity – our ruling in judgment came down before the trial court frivolity award because the trial court frivolity award took some time because there was a hearing in October of 2001. There was a delay in time to take some testimony for the allocation of apportionment and I believe there were two hearings in 2002 which ultimately resulted in the judgment.

THE COURT: When the Supreme Court vacated the Court of Appeals' decision, it didn't explicitly vacate the trial court judgment. It probably should have, or somebody probably should have, but I think it's clear that it wasn't done. And then, as I understand it, it went back to the Court of Appeals for really a second decision about whether things

were frivolous under the terms [10] the Supreme Court had set. Forth and the Court of Appeals then said: Okay. It's not frivolous, but we find the brief to be in violation of our rules and we order costs for that. It then got sent back to the trial court for a decision about those costs and the parties at some point simply agreed there wouldn't be any costs for that.

MR. SCHULZ: That's right. That's correct.

THE COURT: I'm assuming that there was no understanding that the parties were agreeing there would not be costs for that because the judgment of $3,700 still stood in some way, at least that is not a part of the written record.

MR. SCHULZ: There was no such understanding. We considered that the $3,500 judgment was vacated.

MR. CROKE: I'm sorry. We? Who's "we"?

THE COURT: Hold on, Mr. Croke.

MR. CROKE: I'm sorry. I thought I was being included in the "we" here and that's my problem. I apologize.

[11] THE COURT: Well, I won't assume that Mr. Schulz is speaking for you.

MR. CROKE: Thank you.

THE COURT: Go ahead, Mr. Schulz.

MR. SCHULZ: As I said, I think that Mr. Morters, and anyone he consulted with, believe that the $3,500 judgment was vacated and that there was no further concern with respect to that issue.

THE COURT: All right. Anything else in support of the motion?

MR. SCHULZ: Well, yes, Your Honor. The factual chronology beyond the written record is that with the background of this acrimonious litigation, we've got a – we've got three judgments entered. One which is vacated and never – the paperwork was never done by anybody to remove it. And then years later, there's a real estate closing eminent and there's a request by Mr. Morters' respective mortgage lender for a payout on liens that are listed in the preliminary title report.

[12] Mr. Barr responds with a listing of three judgments including interest, including the vacated judgment, and signs it showing himself purportedly as the owner of record. Later on – and in response to this motion – he says: I have no financial interest in these judgments. I don't know if there's any clear indication of attempted fraud than to say I own three judgments. Please pay me those amounts. And then later to say: I didn't own them at any time in the history of this litigation.

There's a voluminous history of predator misbehavior and abuse that is being directed by the courts in other context. But when you have an attorney who is – with all of his recollection of the

acrimony of this background before him sending such a document and then making no effort to correct it, no effort to assign a judgment to the real party in interest – and I'm confused I'm afraid. When we were talking to the Court on a conference call about scheduling this, counsel said that he didn't get a letter from Mr. Barr about this payout thing. Later on, he says he [13] did. But the insurance company didn't tell him to do anything so he didn't do anything.

Well, I'm not here taking him to task for that. I frankly think that Mr. Croke probably didn't get notice because he changed law firms and so on which only reinforces the misconduct and extraordinary misconduct that is illustrated by the payout letter demand by Mr. Barr and by his own statement which essentially stonewalls his motion except to say: I wasn't the owner. If he wasn't the owner, he committed fraud. Pure and simple. And we think in that situation, he should be subject to the same sort of sanction that Mr. Morters was for doing something that he was far less technically able to avoid than this gentleman.

We ask that both judgments be vacated and annulled. Thank you, Your Honor.

THE COURT: Was Mr. Morters acting pro se at the time the Supreme Court reversed the –

MR. SCHULZ: I believe so. Is that right?

MR. MORTERS: Yes.

[14] MR. SCHULZ: I believe so.

THE COURT: That's my recollection.

MR. SCHULZ: Yes. I think so.

THE COURT: But I'm not certain. And when I say "recollection," I mean from what I've read. I think Judge Moroney had the case at that point. Now I've got it back.

Since it's being agreed that Mr. Barr's letter may be considered essentially evidence in this case, I think I ought to read it before we proceed.

(Whereupon, the Court views a document.)

THE COURT: Mr. Croke, is there any objection to that portion of the motion that asks that the first judgment at issue, the June 20th judgment, be vacated?

MR. CROKE: None.

THE COURT: I'm going to grant the Plaintiff's Motion for Relief from the June 20, 2002, judgment and deny the motion for any further relief. Specifically I'm denying the request for relief from the July 29 judgment in the amount of $10,000.

[15] The basis for the motion is 806.07(h). And while the chronology is somewhat confusing and unusual, there doesn't appear to be any question that the first judgment ought to be vacated and that Mr. Morters is entitled to relief from that judgment. The

defendant's not objecting and I'm granting the motion in that regard.

I'm not at all sure that the statute at issue is intended to give me the authority to impose what amounts to a sanction by vacating an otherwise valid judgment because a party has misbehaved in some respect. I will assume for purposes of this ruling that I have that authority, although I have some serious questions about it. There's a strong principal that favors the finality of judgments, judgments that should only be undone under unusual circumstances.

I'm not sure that even if I were able to conclude on this record that Mr. Barr knew that the June 20th judgment should have been vacated and deliberately hoped to get that money that he knew he didn't deserve, I'm not sure that there would be authority to do [16] anything other than vacate that judgment. But I'll assume for purposes of discussion that I have that authority, because I'm satisfied that based on the existing record, that the plaintiff has failed to demonstrate some kind of malfeasance.

Is there a suspicion that that might have happened? I have to confess there is. I have to wonder what was in Mr. Barr's mind when he wrote the letter. But I'm not close to persuaded that this was some deliberate effort on his part to collect on what he knew was a bad judgment.

As I said, there may be room to wonder. There may be room to be suspicious. But there's nothing close to evidence here that he was acting in bad faith

and the unusual chronology of this case provides many arguments, many inferences for a contrary inference and that's that he didn't know that this was a bad judgment.

I'm not willing to indulge a presumption that even in a case that's litigated with the kind of emotion that this one was, that years later, all parties [17] remember exactly what happened and understand the significance of what happened. The fact that Mr. Barr is a lawyer perhaps makes the inference a little stronger that he might have known or should have known, but there's just too many other circumstances here that raise a question in my mind about his intent, and I think the burden is on the plaintiff to do more than raise a suspicion. And there are any number of circumstances here that support a contrary inference and other circumstances that suggest that even if he knew or should have known, that this kind of sanction is not appropriate.

He did not go out on his own to execute on this judgment. He apparently responded on a request from a real estate person by providing detailed information about what at that point were valid judgments. This isn't an attempt to execute on a judgment that had been vacated. At most, it was an attempt to execute on a judgment that should have been vacated and is quite different in kind from someone who actually executes on a bad judgment. He simply responded with [18] information that was accurate as things stood at that point.

Now, if I was persuaded that it was more likely than not that he was cheating at this point, I would then struggle with the question of whether this is an appropriate sanction. But as I've indicated, I'm simply not persuaded.

I won't recite all of the chronology here that I think is important in deciding what inferences can be drawn from Mr. Barr's conduct. But clearly this was a complicated set of procedural steps, and clearly the judgment at issue, the first judgment, was never actually vacated.

The fact that Mr. Morters was pro se perhaps allows some sympathy for the fact that he didn't take the steps to vacate it that should have been taken, but that by itself doesn't somehow suggest that Mr. Barr knew or remembered anything about the case.

The reasons why this judgment is now being vacated have to do with the Supreme Court's decision, but that decision simply vacated the Court of Appeals' finding of [19] frivolousness and remanded it for a further determination of whether things were frivolous. It's one of those one-page orders that we get. We look at quickly, whether we're judges, lawyers, or parties, and put it aside. It went back to the Court of Appeals for further proceedings. The Court of Appeals then did not vacate the trial court's finding or judgment of June 20th. It did conclude that it was unable to find that the appeal was frivolous, but awarded the respondents all costs and fees on appeal including attorney's fees pursuant to

Wisconsin Statute Rule 809.83(2). So even if we assume that Mr. Barr is following along each step here, at that point the defendants still have been given an award of all costs and fees on appeal including attorney's fees.

Now, the record does not disclose why that was bargained away. And I won't assume that there was some understanding that the earlier judgment should stay in effect because it was equal to or perhaps less than what the defendants could now get. But under the particular circumstances of this case, if [20] this was assigned over to defendant TIG at some point, it's not hard to imagine that Mr. Barr wouldn't have particularly cared what happened, because this was all money that would ultimately go to his attorney's fees and he had not paid them out-of-pocket.

So the matter went back to the trial court. And based on some agreement of the parties, no fees were assessed based on the Court of Appeals' finding but the underlying judgment was not vacated.

Now, that Court of Appeals' decision which awarded the respondent those costs on appeal was dated January 14, 2003. I'm not sure what date thereafter, the matter was resolved by some agreement, but either TIG Insurance or Mr. Barr sought directly to execute on these judgments, and we then fast forward almost five years to Mr. Barr's letter reciting the judgments that had been entered. And that lapse of time alone at least raises a question and a strong inference that he may not have realized

at that point that there had been no award of fees, which had in fact twice been awarded by the Court of Appeals, or even [21] sought to correlate what these judgments in fact corresponded to.

His letter of February 7 really neither helps or hurts the defendants' argument. It offers a plausible explanation of how this might have happened. It doesn't erase the suspicion that he might have known. But it also doesn't change the fact that under these circumstances, the plaintiff has not established that there was some kind of deliberate malfeasance or bad faith that would support the sanction that the plaintiff has requested.

For those reasons, I am denying the motion as it pertains to the July 29, 2002, judgment. Mr. Schulz, do you want to submit an order granting your motion in part?

MR. SCHULZ: Yes, Your Honor.

THE COURT: Anything else, Mr. Schulz?

MR. SCHULZ: No, Your Honor.

THE COURT: Anything else, Mr. Croke?

MR. CROKE: Nothing, Your Honor.

THE COURT: Adjourned.

[22] (Whereupon, proceedings ended at 11:45 o'clock in the forenoon.)

[Reporter's Certificate Omitted In Printing]

APPENDIX K

COURT OF APPEALS OF WISCONSIN
DISTRICT I
Appeal No. 2008AP001147

RONALD W. MORTERS,

Plaintiff-Appellant,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants-Respondents.

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

APPELLANT'S BRIEF

Court appealed from: Circuit Court for
Milwaukee County

Presiding Judge: Hon. John A. Franke, Circuit Judge

Ronald W. Morters
Appellant, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

[22] B. Erroneous Legal Interpretation

Numerous times throughout its decision, the Circuit Court characterized the appellate frivolity judgment either as a valid judgment or one which had not been vacated. On page 9 of the hearing transcript, the Court noted that the Supreme Court did not explicitly vacate the trial court judgment. (R. 204-9; A. App. 109) Judge Franke subsequently referred to the judgment as being at that point a valid judgment. (R. 204-17; A. App. 117) The trial court portrayed Barr's behavior as an attempt to collect a judgment which should have been vacated. (R. 204-17; A. App. 117) [23] On page 18, the Court stated that the appellate frivolity judgment was never actually vacated. (R. 204-18; A. App. 118) In the Court's view, the Supreme Court simply vacated the Court of Appeals' frivolity finding. (R. 204-18 & 19; A. App. 118 & 119) Finally, on page 19, the trial court noted that the Court of Appeals did not vacate the June 20th judgment. (R. 204-19; A. App. 119) Throughout its decision, the trial court treated the appellate frivolity judgment as being a facially valid judgment. A review of Wisconsin law clearly shows that the trial court was wrong. *The judgment actually had been vacated and was invalid.*

The authority for an appellate frivolity award is derived from Sec. 809.25(3)(a) which provides, in relevant part, as follows:

> "If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A

> motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief."

[24] A reference to Sec. 809.01(4) establishes that the term "court" as used in Chapter 809 means the Court of Appeals or Supreme Court. The plain language of Sec. 809.25(3)(a) vests the authority for an appellate frivolity award in the appellate courts and is consistent with Article VII, Sec. 5(3), of the Wisconsin Constitution which gives the Court of Appeals appellate jurisdiction in the district as the legislature may provide by law. By virtue of Sec. 808.03, the legislature provided for both appeals as of right and appeals by permission. Thus, when the Court of Appeals made its appellate frivolity determination in its April 30, 2002 decision, it was acting pursuant to its authority under Sec. 809.25(3).

After finding an appeal to be frivolous, the Court of Appeals then remands the case to the trial court with directions to determine the amount of the appellate assessment. See *Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W. 2d 1 (Ct. App. 1998). Also see Heffernan, Michael G., *Appellate Practice and Procedure in Wisconsin* (4th ed. [25] 2006), Chapter 16, pages 4-6, for a general discussion of appellate frivolity. A circuit court has no authority to award costs and fees for a frivolous appeal unless directed to do so by an appellate court. *Morters v. Aiken & Scoptur, S.C.*, 2006 WI App. 46, par. 8 & 14, 289 Wis. 2d 833, 712

N.W. 2d 71 (Ct. App. 2006). Acting in accordance with the authority granted by the Court of Appeals, Judge Moroney heard the assessment matter and granted judgment.

When the Wisconsin Supreme Court vacated the portion of the Court of Appeals decision concerning appellate frivolity in its October 21, 2002 order, *the legal foundation for the $3,567.35 judgment disappeared.* (R. 159-1; A. App. 146) As defined by *Black's Law Dictionary*, 4th Edition (1957), the term "vacate" means "to annul; to set aside; to cancel or rescind; to render an act void; as to vacate an entry of record, or a judgment." The net effect of the Supreme Court's order was to vacate the $3,567.35 judgment and render it void. There was no legal basis for the appellate frivolity judgment to stand independently. Thus, [26] the trial court was legally wrong in treating the $3,567.35 as being facially valid and not vacated.

Mr. Morters suspects the trial court confused this situation with one where a circuit court judgment is entered, the Court of Appeals affirms, and the Supreme Court then vacates the appellate decision and remands for reconsideration. Article VII, Sec. 8, of the Wisconsin Constitution gives the Circuit Courts original jurisdiction in all matters civil and criminal except as otherwise provided by law. The Circuit Court's jurisdiction is subject to the appellate and supervisory powers reserved by the Constitution to the Court of Appeals and the Supreme Court. See *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 550, 307 N.W. 2d 881 (1981) and *Kotecki &*

Radtke, S.C. v. Johnson, 192 Wis. 2d 429, 442, footnote 9, 531 N.W. 2d 606 (Ct. App. 1995) When the Supreme Court vacates an appellate decision in that situation, the trial court judgment remains valid. Because the judgment was entered under the Circuit Court's plenary jurisdiction pursuant to Article VII, [27] Sec. 8, it is grounded on independent authority and is not dependent on the appellate decision.

As discussed in the *Sullivan* case, cited earlier, an erroneous view of the law is an erroneous exercise of discretion. The foregoing discussion has demonstrated that the trial court's interpretation of the legal status of the appellate frivolity judgment was erroneous. According to the *Hedtcke*, *Black*, and *Oostburg* cases, mentioned earlier, the exercise of discretion must reflect the application of the appropriate legal standard, and an erroneous exercise of discretion occurs when the wrong legal standard is applied. The treatment of the appellate frivolity judgment as a facially valid, unvacated judgment was clearly not the correct legal standard to be utilized by the trial court in evaluating the behavior of Barr and Croke. Had Ronald's evidence been viewed with the realization that the appellate frivolity judgment had been vacated and was invalid, the Court would have adopted a more critical attitude toward conduct of these attorneys. Although professing suspicion as to Barr's [27] behavior,[4] a review of the hearing transcript will

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[4] (R. 204-16; A. App. 116)

show that all inferences were viewed in the light most favorable to Barr and he received the benefit of doubt in every instance. (R. 204-14 through 21; A. App. 114-121)

* * *

[51] G. Equal Protection Concerns

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the States from denying "to any person within its jurisdiction the equal protection of the laws." Article I, Sec. 1, of the Wisconsin Constitution declares that Wisconsin's citizens have certain inherent rights, among those are life, liberty, and [52] the pursuit of happiness. The Wisconsin Supreme Court has interpreted Article I, Sec. 1, as preserving freedoms substantially equivalent to those guaranteed by the Fourteenth Amendment. See *Chicago & N.W. Ry. v. LaFollette*, 43 Wis. 2d 631, 643, 169 N.W. 2d 441 (1969). Mr. Morters' equal protection rights are thus guaranteed by both Constitutions.

In a plurality opinion in *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956), the Court noted that " . . . at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." When the trial court's treatment of Mr. Morters in this instance is compared with the favorable treatment afforded to Barr at other stages of this litigation, the situation exemplifies the very essence of favoritism and unfair discrimination.

Barr was originally sued due to his failure to follow his client's instructions to obtain a jury trial. (R. 19-3 through 9; A. App. NR) The action was found to be frivolous primarily because the Court determined Barr's [53] conduct was not causal of injury. (R. 129-4; A. App. NR) Morters was penalized $10,000.00 despite Barr's violation of SCR 20:1.2(a) in failing to abide by his client's decision as to the course of the litigation.

In *Morters v. Aiken & Scoptur, S.C.*, cited earlier, other former attorneys who had represented Mr. Morters in the personal injury action sought an appellate fee award against him which was impermissible under the law. *Morters*, 2006 WI App. 46 at par. 1, 6, 8-15. Disregarding the applicable law, the trial court granted the award. Mr. Morters successfully obtained appellate relief reversing the award. *Morters*, 2006 WI App. 46 at par. 1, 6, 8-15. However, his efforts to have Aiken & Scoptur sanctioned for making the request in the first instance proved unsuccessful. *Morters*, 2006 WI App. 46 at footnote 4. Although Aiken & Scoptur received their trial court frivolity award in September of 2006 from funds deposited during the pendency of the appeal in *Morters*, they only satisfied the judgment recently. (R. 189-43 & 44; A. App. 184 & 185)

[54] A previous lack of concern by the trial court about inconsistent testimony in the Barr case undoubtedly contributed to the current situation. In his previous motion for relief from judgment, Mr. Morters directed the trial court's attention to inconsistent

testimony on a significant point. (R. 177-6; A. App. NR) Counsel representing the automobile insurance carrier in the personal injury action testified that his client would not have paid more to settle the case than the $575,000.00 offered at mediation. (R. 177-6, 178-5; A. App. NR) However, three settlement offers totaling $597,500.00 were actually made by the insurer's counsel to settle the case. (R. 177-6, 178-55; A. App. NR) Both the insurer's counsel and Barr's attorney should have recognized that such testimony was inaccurate. When Morters attempted to discuss this matter at the January 26, 2004 hearing, the trial court did not want to hear about it. (R. 181-9 & 10; A. App. NR) Had the trial court at least shown concern for possible misconduct by listening to Mr. Morters at the time, the current situation may have been prevented.

[55] At the January 26, 2004 hearing on Mr. Morters' previous motion for relief from judgment, the trial court thought there was a greed factor in the Barr case from Morters' standpoint. (R. 181-7; A. App. NR) Equal protection of law now demands a similar concern for the inherent greed in an attorney's attempt to collect a vacated judgment. Concern about greed must run both ways. In addressing the prior motion for relief, the trial court noted the serious consequence of bringing an action against a professional person when there is no case. (R. 181-7 & 8; A. App. NR) An attempt to collect payment on a vacated

judgment by a professional person also carries serious consequences about which the Courts must have an equivalent concern.

In its March 25, 2003 decision in Appeal No. 2002AP2434, the Court of Appeals commented that Morters argument on mitigation and assessment indicates that he still has not learned his lesson as to the development of a solid argument to support his claims. (R. 161-8; A. App. NR) If [56] there is no equivalent sanction for this attorney creditor misconduct, the lesson learned will be that such conduct is permissible. The Court cannot allow such message to be sent.

Given the history of attorneys' disregard for the law and rules of professional conduct, it comes as no surprise that payment was sought on a vacated judgment. Unequal protection of law motivates the favored class to misbehave. If the Court of Appeals does not reverse the trial court's decision, Mr. Morters will have been denied his constitutional right to equal protection of law. *The familiar statue symbolizing justice is depicted as being blindfolded in order to emphasize that justice is to be administered fairly and impartially*. A fair and impartial system of justice cannot tolerate sanctioning the former client while allowing misconduct by an attorney creditor. A fair and impartial system of justice cannot ignore clear evidence of malfeasance. The Wisconsin courts are charged with supporting the United States and Wisconsin Constitutions. [57] The discharge of this duty

now requires relief in order to protect Mr. Morters' right to equal protection of law.

* * *

APPENDIX L

SUPREME COURT OF WISCONSIN
Appeal No. 2008AP001147

RONALD W. MORTERS,

Plaintiff-Appellant-Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants-Respondents-Respondents.

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

PETITION FOR REVIEW

Court appealed from: Wisconsin Court of Appeals, District I, Hon. Patricia S. Curley, Joan F. Kessler & Kitty K. Brennan, Appellate Judges

Ronald W. Morters
Petitioner, Pro Se

2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

* * *

[2] STATEMENT OF THE CRITERIA SUPPORTING REVIEW

The criteria under Wisconsin Statutes, Sec. 809.62(1), which support the granting of review in this matter by the Supreme Court are as follows:

a. The petition for review demonstrates a need for the Supreme Court to consider establishing, [3] implementing, or changing a policy within its authority. (Wis. Stats., Sec. 809.62(1r)(b))

b. A real or significant question of federal or state constitutional law is presented. (Wis. Stats., Sec. 809.62(1r)(a))

Explanation:

Motions for relief from judgment are directed to the sound discretion of the trial court. *Brown v. Moser Lee Co.*, 164 Wis. 2d 612, 616-617, 476 N.W. 2d 294 (Ct. App. 1991). The test on review of a trial court's order refusing to reopen a judgment is whether such refusal was an abuse of discretion. *Conrad v. Conrad*, 92 Wis. 2d 407, 414, 284 N.W. 2d 674 (1979). The preferred term is now "an erroneous exercise of discretion," but the review standard remains the same regardless of the terminology. *City of Brookfield v. Milwaukee Metro Sewerage District*, 171 Wis. 2d 400, 423, 491 N.W. 2d 484 (1992).

As will be discussed herein, the trial court's decision was flawed due to its erroneous legal view regarding [4] the legal status of a $3,567.35 appellate

frivolity judgment previously entered against Mr. Morters. Ronald also presented equal protection concerns which required relief from the $10,000.00 judgment. An appellate court will ordinarily find an erroneous exercise of discretion if the trial court applied the wrong legal standard. *State v. Black*, 2001 WI 31, par. 9, 242 Wis. 2d 126, 624 N.W. 2d 363 (2001). Misapplication or an erroneous view of the law is an erroneous exercise of discretion. *Sullivan v. Waukesha County*, 218 Wis. 2d 458, 470, 578 N.W. 2d 596 (1998). The application of constitutional principles to the facts of a case presents a question of law. *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 62, 443 N.W. 2d 50 (Ct. App. 1990).

Despite extensive arguments in Ronald's briefs regarding the legal error and constitutional issue, the Court of Appeals refused to address these matters. (R. NN; P. App. 203-216) When appeals from discretionary determinations raise legal errors and constitutional concerns, the United States and Wisconsin Constitutions, Sec. 808.03(1), and the [5] applicable standards of appellate review outlined in Ronald's Argument converge to impose upon the appellate courts a legal responsibility to address such matters. The Court of Appeals' failure to consider and discuss these matters demonstrates the need for the Supreme Court to establish clear policy guidelines requiring the appellate courts to specifically address legal errors and constitutional issues arising in the context of an appeal from a discretionary determination.

By refusing to address such matters, the Court of Appeals has effectively deprived Mr. Morters of due process of law. The deprivation of due process at the appellate level represents a significant constitutional question requiring review. Through the granting of this petition, the Supreme Court can insure that the appellate courts fulfill their legal responsibilities and provide appellate due process.

In addition to the aforementioned criteria, the fact that this case involves attorney creditor misconduct presents another compelling reason for review. Since the [6] Supreme Court governs the State Bar of Wisconsin, the Court should be particularly concerned about misconduct by an attorney creditor.

* * *

[19] ARGUMENT

I. BECAUSE OF THE ATTORNEY CREDITOR MISCONDUCT IN THIS CASE, THE $10,000.00 TRIAL COURT FRIVOLITY JUDGMENT AGAINST RONALD W. MORTERS SHOULD BE SET ASIDE AND NULLIFIED PURSUANT TO WISCONSIN STATUTES, SEC. 806.07(1)(h).

A. Appellate Due Process and the Need for Review

The United States Supreme Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment of the United States Constitution does not require a State to provide appellate review. See *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 31 L. Ed. 2d

36 (1972), *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956) and *District of Columbia v. Clawans*, 300 U.S. 617, 627, 57 S. Ct. 660, 81 L. Ed. 843 (1937). When the State does provide an appeal, however, *it cannot be granted to some litigants and capriciously or arbitrarily denied to others.* [20] See *Lindsey*, 405 U.S. at 77, *Griffin*, 351 U.S. at 18, and *Smith v. Bennett*, 365 U.S. 708, 712-714, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961). In *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966), the Court recognized that once appellate avenues are established, they must be free of unreasoned distinctions that can only impede open and equal access to the courts.

The people of this State recognized the importance of appellate review. Article VII, Sec. 3(2) of the Wisconsin Constitution confers appellate jurisdiction on the Wisconsin Supreme Court over all courts, and Sec. 3(3) provides that the Supreme Court may review judgments and orders of the Court of Appeals. Article VII, Sec. 5(3) gives the Court of Appeals appellate jurisdiction as the legislature may provide by law. By virtue of Sec. 808.03(1), the legislature provided for *an appeal as of right* to the Court of Appeals from a final judgment or order of the circuit court. The right to appellate review is further protected by Article I, Sec. 9 which provides that every person is entitled to a [21] remedy in the laws for his injuries. In *Metzger v. Wisconsin Dept. of Taxation*, 35 Wis. 2d 119, 129, 150 N.W. 2d 431 (1967), the Supreme Court noted that the right/remedy provision did not entitle

litigants to the exact remedy they desire but merely to their day in court.

A vital principle of appellate due process which has evolved in Wisconsin is the standard of review for questions of law. The Wisconsin courts have recognized that legal questions are the province of the appellate courts and are *reviewable ab initio*. See *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 551, 309 N.W. 2d 366 (Ct. App. 1981) and *Jaeger Baking Co. v. Kretschmann*, 96 Wis. 2d 590, 594, 292 N.W. 2d 622 (1980). An appellate court must decide questions of law independently, without deference to the decision of the circuit court. *State v. Vanmanivong*, 2003 WI 41, par 17, 261 Wis. 2d 202, 661 N.W. 2d 76 (2003). The Supreme Court decides questions of law independently without deference to the trial court or court of appeals. *Ball v. District No. 4, Area Board*, 117 Wis. 2d [22] 529, 537, 345 N.W. 2d 389 (1984). For appeals as of right, the aforementioned constitutional, statutory, and case law provisions have created a uniform standard of appellate due process *which requires a fresh, independent, and reasoned analysis of questions of law*.

As noted in his Criteria, Ronald's appeal presented a legal question and constitutional concern which arose within the context of a discretionary decision. The application of the wrong legal standard and an erroneous view of the law constitute an erroneous exercise of discretion. *Black*, 2001 WI 31, at par. 9 and *Sullivan*, 218 Wis. 2d at 470. To be sustained, a discretionary decision must be based upon the

appropriate and applicable law. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W. 2d 16 (1981).

When the Court of Appeals refused to address these legal matters, Mr. Morters was deprived of appellate due process. The Court of Appeals effectively denied Ronald access to the type of review to which he was legally entitled. *Black's Law Dictionary*, 4th Edition (1957) defines arbitrary [23] as "without adequate determining principle", "not done or acting according to reason or judgment", "without cause based upon law", or "not governed by any fixed rules or standard". All of these characterizations describe the Court's inexplicable failure to address these questions of law.

According to *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) and *Nebbia v. People of New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934), due process protects against arbitrary action. Similar protection is afforded by Article I, Sec. 1 of the Wisconsin Constitution which has been interpreted as preserving freedoms substantially equivalent to those guaranteed by the Fourteenth Amendment. See *Chicago & N.W. Ry. v. La Follette*, 43 Wis. 2d 631, 643, 169 N.W. 2d 441 (1969). Intervention by the Supreme Court is needed to establish guidelines *requiring the appellate courts to fulfill their legal duty to conduct a de novo review of legal questions* arising in the context of a discretionary decision. The Court must also act to protect against arbitrary action and preserve [24] the litigant's right to appellate due process of law. This case

presents a situation similar to that in *State v. Outlaw*, 108 Wis. 2d 112, 120, 321 N.W. 2d 145 (1982) wherein the Supreme Court granted review from a discretionary decision because a legal question[5] arose in the context of such appeal.

B. Erroneous Legal Interpretation

The trial court's analysis of the situation was clouded by a flawed interpretation of the law which was left uncorrected by the Court of Appeals. Numerous times throughout its decision, the Circuit Court characterized the appellate frivolity judgment either as a valid judgment or one which had not been vacated. On page 9 of the hearing transcript, the Court noted that the Supreme Court did not explicitly vacate the trial court judgment. (R. 204-9; P. App. 116) Judge Franke subsequently referred to the judgment as being at that point a valid judgment. (R. 204-17; P. App. 124) The trial court portrayed Barr's behavior as an attempt to collect a judgment which should have been [25] vacated. (R. 204-17; P. App. 124) On page 18, the Court stated that the appellate frivolity judgment was never actually vacated. (R. 204-18; P. App. 125) In the Court's view, the Supreme Court simply vacated the Court of Appeals' frivolity finding. (R. 204-18 & 19; P. App. 125 & 126) Finally, on page 19, the trial court noted that the Court of

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[5] A question arose regarding the burden of proof in a criminal matter. *Outlaw*, 108 Wis. 2d at 120.

Appeals did not vacate the June 20th judgment. (R. 204-19; P. App. 126) Throughout its decision, the trial court treated the appellate frivolity judgment as being a facially valid judgment. A review of Wisconsin law clearly shows that the trial court was wrong. *The judgment actually had been vacated and was invalid.*

The authority for an appellate frivolity award is derived from Sec. 809.25(3)(a) which provides, in relevant part, as follows:

> "If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is [26] filed, no later than the filing of the cross-respondent's brief."

A reference to Sec. 809.01(4) establishes that the term "court" as used in Chapter 809 means the Court of Appeals or Supreme Court.

The plain language of Sec. 809.25(3)(a) vests the authority for an appellate frivolity award in the appellate courts and is consistent with Article VII, Sec. 5(3), of the Wisconsin Constitution which gives the Court of Appeals appellate jurisdiction in the district as the legislature may provide by law. By virtue of Sec. 808.03, the legislature provided for both appeals as of right and appeals by permission. The plenary jurisdiction given to the circuit courts under Article

VII, Sec. 8, is subject to the appellate and supervisory powers reserved by the Constitution to the Court of Appeals and the Supreme Court. See *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 550, 307 N.W. 2d 881 (1981) and *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis. 2d 429, 442, footnote 9, 531 N.W. 2d 606 (Ct. App. 1995) Thus, when the Court of Appeals made its appellate [27] frivolity determination in its April 30, 2002 decision, it was acting pursuant to its authority under Sec. 809.25(3).

After finding an appeal to be frivolous, the Court of Appeals then remands the case to the trial court with directions to determine the amount of the appellate assessment. See *Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W. 2d 1 (Ct. App. 1998). Also see Heffernan, Michael G., *Appellate Practice and Procedure in Wisconsin* (4th ed. 2006), Chapter 16, pages 4-6, for a general discussion of appellate frivolity. A circuit court has no authority to award costs and fees for a frivolous appeal unless directed to do so by an appellate court. *Morters v. Aiken & Scoptur, S.C.*, 2006 WI App. 46, par. 8 & 14, 289 Wis. 2d 833, 712 N.W. 2d 71 (Ct. App. 2006). Acting in accordance with the authority granted by the Court of Appeals, Judge Moroney heard the assessment matter and granted judgment.

When the Wisconsin Supreme Court vacated the portion of the Court of Appeals decision concerning appellate frivolity in its October 21, 2002 order, *the legal* [28] *foundation for the $3,567.35 judgment disappeared.* (R. 159-1; P. App. 151) As defined by

Black's Law Dictionary, 4th Edition (1957), the term "vacate" means "to annul; to set aside; to cancel or rescind; to render an act void; as to vacate an entry of record, or a judgment." The net effect of the Supreme Court's order was to vacate the $3,567.35 judgment and render it void. There was no legal basis for the appellate frivolity judgment to stand independently.

On reconsideration, the Court of Appeals found the appeal was not frivolous but imposed penalties for appellate briefing deficiencies. (R. 160-2, 5 through 8; P. App. 153, 156-159) By virtue of the stipulation and order in November of 2003, any potential obligation of Mr. Morters for appellate costs and fees was discharged. (R. 170-1 & 2; P. App. 161 & 162)

The trial court was legally wrong in treating the $3,567.35 judgment as being facially valid and not vacated. Through a de novo review, the Court of Appeals should have addressed and corrected this error of law.

* * *

[38] E. Equal Protection Violation

As noted earlier, the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution guarantee Ronald's right to equal protection of law. In a plurality opinion in *Griffin*, cited earlier, the United States Supreme Court noted that " . . . at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." *Griffin*, 351 U.S. at 18. Ronald extensively

advised the Court of Appeals as to how the trial court's treatment of him in this instance exemplified the very essence of favoritism and unfair discrimination when compared with the favorable treatment previously afforded to [39] Barr. (R. NN; P. App. 210-216) The Court of Appeals' failure to address such arguments denied Ronald's access to de novo review and deprived him of appellate due process.

Barr was originally sued due to his failure to follow his client's instructions to obtain a jury trial. (R. 19-3 through 9; P. App. NR) The action was found to be frivolous primarily because the Court determined Barr's conduct was not causal of injury. (R. 129-4; P. App. NR) Morters was penalized $10,000.00 despite Barr's violation of SCR 20:1.2(a) in failing to abide by his client's decision as to the course of the litigation.

In *Morters v. Aiken & Scoptur, S.C.*, cited earlier, other former attorneys who had represented Mr. Morters in the personal injury action sought an appellate fee award against him which was impermissible under the law. *Morters*, 2006 WI App. 46 at par. 1, 6, 8-15. *Disregarding the applicable law presented to it by Ronald, the trial court granted the award*. Mr. Morters successfully obtained appellate relief reversing the award. *Morters*, 2006 WI App. [40] 46 at par. 1, 6, 8-15. However, *his efforts to have Aiken & Scoptur sanctioned for making the request in the first instance* proved unsuccessful. *Morters*, 2006 WI App. 46 at footnote 4.

In his previous motion for relief from the $10,000.00 judgment, Mr. Morters directed the trial court's attention to inconsistent testimony on a significant point. (R. 177-6; P. App. NR) *Counsel representing the automobile insurance carrier* in the personal injury action was used as a witness at trial and testified that his client would not have paid more to settle the case than the $575,000.00 offered at mediation. (R. 177-6, 178-5; P. App. NR) However, three settlement offers totaling $597,500.00 were actually made by the insurer's counsel to settle the case. (R. 177-6, 178-55; P. App. NR) Both the insurer's counsel and Barr's attorney knew that such testimony was inaccurate. When Morters attempted to discuss this matter at the January 26, 2004 hearing, the trial court vehemently objected to it being discussed. (R. 181-9 & 10; P. App. NR)

[41] At the hearing on Mr. Morters' previous motion for relief from judgment, the trial court thought there was a greed factor in the Barr case from Morters' standpoint. (R. 181-7; P. App. NR) Equal protection of law now demands a similar concern for the inherent greed in an attorney's attempt to collect a vacated judgment. In addressing the prior motion for relief, the trial court noted the serious consequence of bringing an action against a professional person when there is no case. (R. 181-7 & 8; P. App. NR) An attempt to collect payment on a vacated judgment by a professional person also carries serious consequences about which the Courts must have an equivalent concern.

The familiar statue symbolizing justice is depicted as being blindfolded in order to emphasize that justice is to be administered fairly and impartially. A fair and impartial system of justice cannot tolerate sanctioning the former client while allowing misconduct by an attorney creditor. Although charged with supporting the United States and Wisconsin Constitutions, the Court of Appeals utterly [42] disregarded the equal protection violation herein. The accommodation of the actions of these attorneys by the Courts must be stopped. By granting review, the Supreme Court can restore equal protection of law.

* * *

APPENDIX M

CROEN & BARR LLP
A Limited Liability Partnership

Attorneys At Law
250 East Wisconsin Avenue
Suite 1550
Milwaukee, Wisconsin 53202
Telephone 414 226 2080
FAX 414 226 2070
Email info@croenbarr.com

Charles H. Barr
Frederick R. Croen
Mariya Basin

November 20, 2007

Ms. Kathy Gericke
Associated Bank
Waukesha Grandview Branch
Fax No. 262-547-9499

RE: Ronald W. Morters

Dear Ms. Gericke:

This responds to your request for a payoff letter with respect to judgments against Ronald W. Morters. There are three unsatisfied judgments, which appear on the enclosed printout from the Wisconsin Circuit Court Access database. I have numbered them # 1, # 2, and # 3 on the printout. With respect to each, I have circled the judgment date, principal amount, indication of no satisfaction, identification of the judgment creditors, and identification of Mr. Morters as a (or the) judgment debtor. Note that on all three judgments I am one of two judgment creditors, the other being TIG Insurance Company. The printout

refers to two other judgments that are not pertinent to your inquiry.

Payoff amounts as of **November 20, 2007** are as follows:

Judgment # 1:	
Principal amount	$1,785.55
Interest @ 12% per annum	1,327.16
Total for Judgment # 1	$3,112.71
Per diem	$ 0.59
Judgment # 2:	
Principal amount	$3,567.35
Interest @ 12% per annum	2,319.36
Total for Judgment # 2	$5,886.71
Per diem	$ 1.17
Judgment # 3:	
Principal amount:	$10,000.00
Interest @ 12% per annum:	6,373.77
Total for Judgment # 3	$16,373.77
Per diem	$ 3.28
Total due on all judgments:	$25,373.19
Total per diem	$ 5.04

If you have any questions, please contact me.

Very truly yours,

/s/ Charles H. Barr
Charles H. Barr

Enclosure

c: Attorney William P. Croke

APPENDIX N

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

RONALD W. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No.: 99-CV-005303
Case Code: 30703

SHANNON L. MORTERS,

Plaintiff,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Defendants.

Case No.: 00-CV-001705
Case Code: 30703

AFFIDAVIT OF RONALD W. MORTERS

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Ronald W. Morters, being first duly sworn on oath, deposes and says as follows:

1. That he is one of the plaintiffs in the above-entitled actions and makes this affidavit in support of his Motion for Relief from Judgments.

2. That in November of 2007, your affiant attempted to refinance his home mortgage loan through Associated Bank.

3. That your affiant anticipated that two judgments against him in favor of Attorney Charles H. Barr and TIG Insurance Company in the amounts of $1,785.55 and $10,000.00 would appear on his credit record.

4. That your affiant intended to pay off these judgments as part of his refinancing transaction.

5. That as expected, your affiant was advised by his loan officer, Kathy Gericke, from the Grandview Branch of Associated Bank in Waukesha that the Barr judgments had appeared. That he requested Ms. Gericke to obtain a payoff letter for said judgments.

6. That Ms. Gericke obtained a payoff letter from Attorney Barr which recited that your affiant owed the following three judgments:

a. $1,785.55, together with interest in the amount of $1,327.16, for a total of $3,112.71;

b. $3,567.35, together with interest in the amount of $2,319.36, for a total of $5,886.71;

c. $10,000.00, together with interest in the amount of $6,373.77, for a total of $16,373.77.

7. That when informed of such payoff amounts, your affiant was certain that something was wrong. That after reviewing the payoff letter and printout faxed to him by Ms. Gericke, your affiant realized that Barr was attempting to collect the $3,567.35 appellate fee award which had been previously nullified by the Wisconsin Supreme Court.

8. That Associated Bank refused to proceed with the transaction unless all three judgments were paid.

9. That as a result of this problem, your affiant was unable to proceed with his refinancing transaction, has had his credit rating damaged, and was forced to bring this motion for relief.

10. That the documents included in his Appendix for Brief in Support of Motion for Relief from Judgments which are designated as Exhibits A through K are true and correct copies of the following documents:

A. August 31, 2001 Judgment against Ronald W. Morters in the Amount of $1,785.55

B. April 30, 2002 Decision of Court of Appeals in Appeal No. 01-2011

C. June 20, 2002 Judgment against Ronald W. Morters in the Amount of $3,567.35

D. October 21, 2002 Order of Wisconsin Supreme Court in Appeal No. 01-2011

E. January 14, 2003 Decision of Court of Appeals in Appeal No. 01-2011

F. Stipulation and Order filed on November 25, 2003

G. July 29, 2002 Judgment against Ronald W. Morters in the Amount of $10,000.00

H. November 20, 2007 Payoff Letter from Attorney Charles H. Barr

I. Wisconsin Circuit Court Access Judgment Printout

J. Excerpt from January 26, 2004 Hearing Transcript (pages 1-4 only)

K. December 20, 2007 Letter from Aiken & Scoptur, S.C. and accompanying Satisfaction of Judgment

/s/ Ronald W. Morters
Ronald W. Morters

Subscribed and sworn to before me
this 11th day of January, 2008.

/s/ Gregory K. Miller
Notary Public, State of Wisconsin
My Commission is permanent.

APPENDIX O

CROEN & BARR LLP
A Limited Liability Partnership

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Charles H. Barr
Frederick R. Croen
Mariya Basin

February 7, 2008

Deputy Clerk of Circuit Court, Branch 25
Milwaukee County Courthouse, Room 502
901 North Ninth Street
Milwaukee, WI 53233

RE: Morters v. Barr, et al., Nos. 99-CV-5303

Dear Madam:

Please accept this letter as my response to the motion scheduled for hearing on February 18 at 11:00.

TIG Insurance Company supplied counsel for me in this action (namely, Bill Croke) at TIG's expense. TIG therefore is entitled to the proceeds of the judgments at issue. I have no interest in those proceeds.

For that and other reasons, and contrary to the movant's imaginings, I long ago stopped paying attention to the labyrinthine death throes of this litigation.

When I received a phone call from Kathy Gericke of Associated Bank requesting a payoff letter last November, I phoned Attorney Croke and left a message. Because I did not hear back from him, because I did not wish to be accused of hindering whatever financial transaction the movant contemplated, and because I actually did not wish to hinder any such transaction, I prepared and transmitted the payoff letter. I did so by consulting CCAP and calculating payoff amounts for each of the three unsatisfied judgments of record against the movant and in favor of TIG and myself. I was attempting to assist the bank by responding to its request. When it comes to the movant, however, no good deed goes unpunished.

I do not recall ever being advised of an agreement not to collect one of the judgments. Because I have no financial interest in the matter, I would not have expected to be advised. If I was so advised, I have long since forgotten it, for the very same reason. Please note that I was present neither at the January 26, 2004 motion hearing at which there apparently was some allusion to such an agreement, nor at any previous hearing where such an agreement may have been reached.

The movant's arguments concerning my motives and intent are absurd.

I do not know why the movant or his counsel never secured and filed a stipulation and order vacating or satisfying the judgment in question as a matter of

public record. Nor do I know why the movant or his counsel did not bring the matter to my attention by letter or phone last November and ask me to correct the payoff letter.

In summary, and to be crystal clear: *I do not have and never had any financial interest in any judgment against the movant.* I do not plan to attend the motion hearing. I do *not* speak for TIG, however, and I understand it does plan to be represented by counsel at the hearing.

Please present this letter to Judge Franke prior to the motion hearing. Thank you for your attention to this matter.

Very truly yours,

/s/ Charles H. Barr
Charles H. Barr

c: Attorney Leonard W. Schulz
Attorney William P. Croke
Ms. Colleen Reilly

APPENDIX P

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

RONALD W. MORTERS,

PLAINTIFF,

V.

CHARLES H. BARR AND
TIG INSURANCE COMPANY,

DEFENDANTS.

CASE NO. – 99-CV-005303

CASE CODE NO. – 30703

AFFIDAVIT OF WILLIAM P. CROKE

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

WILLIAM P. CROKE, being first duly sworn on oath deposes and states as follows:

1. I was the attorney for Attorney Charles H. Barr's legal malpractice insurance company that had a policy in effect for the time period when Ronald Morters made his claim against Attorney Barr and I defended the claim of Ronald Morters.

2. At the time I handled the case of Ronald Morters against Attorney Barr I was with the law firm of Quale, Feldbruegge, Calvelli, Thom & Croke, S.C.

3. In October of 2006, I left that law firm and joined the law firm of von Briesen & Roper, S.C.

4. The law firm of Quale, Feldbruegge, Calvelli, Thom & Croke, S.C. disbanded and went out of existence at the end of 2006.

5. I never made any attempt on behalf of Attorney Barr's insurer to enforce the judgment resulting from the Court of Appeals' decision determining that Ronald Morters should be responsible for frivolous appeal costs, all of which are the subject of Ronald Morters' present motion.

6. My file in this matter was closed long before I left Quale, Feldbruegge, Calvelli, Thom & Croke, S.C. and joined von Briesen & Roper, S.C.

7. I did not feel it was my place to become involved in any fashion and in any respect upon receiving Attorney Barr's November 20, 2007, letter because I was not asked by his carrier to attempt to enforce the judgments entered against Ronald Morters and I had no recollection of the status of the case or the judgments.

8. Had Ronald Morters or his attorney, Leonard Schulz, contacted me and provided the information concerning the $3,567.35 judgment to me that he has attached to his motion, I would have made every effort to assist him in satisfying that judgment without payment. I would have informed the insurer of the facts and feel confident the matter would have been quickly resolved.

9. I have read Attorney Barr's letter and, in my opinion, it in no way attempts to "enforce" the judgment but, rather, merely reiterates the status of the record as it appeared at that time.

/s/ William P. Croke
WILLIAM P. CROKE
WI State Bar No. – 1012156

Subscribed and sworn to before me
this 29th day of February, 2008.

[SEAL]

/s/ Marianne Strackbein
Notary Public, State of Wisconsin
My Commission expires 1/17/10

No. 09-133

In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

CHARLES H. BARR and
TIG INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Wisconsin Court Of Appeals, District I

PETITION FOR REHEARING

RONALD W. MORTERS
Petitioner, Pro Se
2755 Minot Lane
Waukesha, Wisconsin 53188
(262) 544-4355

QUESTIONS PRESENTED

I. Did the United States Supreme Court's denial of Ronald W. Morters' petition for writ of certiorari which presented the questions denoted below as Nos. II and III create a constitutional conflict between the Court's jurisdiction as defined by Article III, Sec. 2, of the Constitution and 28 U.S.C. § 1257(a) and the fundamental rights of access to due process and to petition for redress of grievances established by the First, Fifth, and Fourteenth Amendments, and cause a Supremacy Clause problem?

II. Did the Wisconsin Court of Appeals' failure to conduct a de novo review of the legal error in this case in accordance with established case law standards and the Wisconsin Supreme Court's failure to rectify this error violate Ronald W. Morters' rights to due process of law and equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution?

III. Did the Wisconsin Supreme Court's use of the discretionary review process to avoid reviewing the constitutional violation therein violate the Supremacy Clause of the United States Constitution?

LIST OF PARTIES

The caption of this petition identifies all of the parties who have participated in both the trial court and appellate proceedings in this case. Shannon L. Morters was also a plaintiff in the consolidated actions, but she has not participated in any appellate proceedings because no fee assessment was made against her. The Morters' attorney, Robert F. Sutton, did not appeal from the fee assessment against him. Because this petition involves a deprivation of Fourteenth Amendment rights and a violation of the Supremacy Clause by the Wisconsin courts, copies of this petition have been forwarded to the Attorney General for the State of Wisconsin. Furthermore because this petition raises a question as to the constitutionality of 28 U.S.C. § 1257(a) due to the denial of certiorari herein, copies of this petition have been forwarded to the Solicitor General of the United States. As indicated in the Jurisdiction section, notification has been made as required by Supreme Court Rule 29.4(b) and (c).

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 44.2, the Petitioner, Ronald W. Morters, prays that the Court grant a rehearing of the Order denying his Petition for Writ of Certiorari which was entered on October 13, 2009 in Case No. 09-133.

OPINIONS BELOW

The order of the Wisconsin Supreme Court dated May 13, 2009 denying the Petition for Review is unpublished and reprinted in the Appendix ("App.") to Mr. Morters' Petition for Writ of Certiorari at H1-2. The decision of the Wisconsin Court of Appeals, District I, dated January 21, 2009, is unpublished and reprinted in the Appendix at A1-6. The Order denying Mr. Morters' Petition for Writ of Certiorari is reported at the U.S. Supreme Court Website at http://www.supremecourtus.gov in the October 13, 2009 Orders List, and the Clerk of the United States Supreme Court's letter reciting the Court's Order is reprinted in the Rehearing Appendix ("R. App.") at A1.

JURISDICTION

The decision of the Wisconsin Court of Appeals, District I, was entered on January 21, 2009. A timely

Petition for Review of said decision was denied by the Wisconsin Supreme Court in an order entered on May 13, 2009 thereby affirming the Court of Appeals' decision and exhausting all state judicial remedies. The petition for writ of certiorari was filed within 90 days of the Wisconsin Supreme Court's order denying review. The United States Supreme Court has jurisdiction to review the order of the Wisconsin Supreme Court and the decision of the Wisconsin Court of Appeals pursuant to 28 U.S.C. § 1257(a). This petition for rehearing was filed within 25 days of the Supreme Court's order denying the petition for writ of certiorari and is therefore timely under Supreme Court Rule 44.2.

Rule 29.4(c) Statement

Because this petition draws into question the constitutionality of Wisconsin's discretionary review statutes, Mr. Morters hereby provides notice in compliance with Supreme Court Rule 29.4(c) that 28 U.S.C. § 2403(b) may apply. Accordingly, copies of this petition have been served on the Attorney General for the State of Wisconsin.

Rule 29.4(b) Statement

Because this petition questions the constitutionality of 28 U.S.C. § 1257(a) when certiorari is denied in a case where access to due process has been denied by a state court, Mr. Morters hereby provides notice in compliance with Supreme Court Rule

29.4(b) that 28 U.S.C. § 2403(a) may apply. Accordingly, copies of this petition have been served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are as follows: Section 1 of the Fourteenth Amendment; the First Amendment; the Fifth Amendment; Article III, Sec. 2, paragraph 2; and Article VI, paragraph 2. These provisions are set forth at App. I1-3 in the Appendix to the Petition for Writ of Certiorari. 28 U.S.C. § 1257(a) is involved and is set forth at App. I1. This case also involves Article I, Secs. 1 and 9, and Article VII, Secs. 3(2), 3(3), and 5(3) of the Wisconsin Constitution which are reproduced at App. I4-5. The state statutes involved are Wisconsin Statutes, Secs. 806.07(1)(h), 808.03(1), 808.10, and 809.62(1m) & (1r) which are set forth at App. I5-8. United States Supreme Court Rule 10 is also involved and is reprinted at R. App. B1-2.

STATEMENT OF THE CASE

For a complete recitation of the facts of this case, Mr. Morters respectfully directs this Court to the Statement of the Case contained in his Petition for Writ of Certiorari.

REASONS FOR GRANTING OF THE PETITION FOR REHEARING

A. Introduction

According to Rule 44.2, the grounds for the rehearing of an order denying a petition for writ of certiorari shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Mr. Morters believes that the Supreme Court's denial of certiorari in this case has given rise to other substantial grounds not previously presented by him which require a rehearing.

B. Other Substantial Grounds

In Section I of his Petition for Certiorari, Mr. Morters argued that the Wisconsin Court of Appeals' failure to conduct a de novo review of the legal error in accordance with established case law standards and the Wisconsin Supreme Court's failure to rectify this error violated his rights to due process of law and equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Sec. 1, of the Wisconsin Constitution. (Petition, p. 11-33) In conjunction with its supervisory role discussed in *Chandler v. Florida*, 449 U.S. 560, 570, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981), Mr. Morters urged the Court to grant certiorari to remedy such violation. (Petition, p. 17-20) Because this case involved a denial of access to due process, Morters believed the situation required strict scrutiny by the

Court. (Petition, p. 19-20) In Section II of his Petition, Mr. Morters argued that the Wisconsin Supreme Court's use of the discretionary review process to avoid reviewing the due process deprivation in this case violated the Supremacy Clause of the United States Constitution.

By denying certiorari in this due process "access denial" case, the Supreme Court has created a constitutional conflict between the Court's jurisdiction under Article III, Sec. 2, and 28 U.S.C. § 1257(a) and the fundamental rights to due process of law set forth in the Fifth and Fourteenth Amendments and to petition for the redress of grievances provided by the First Amendment. On page 20 of his Petition, Mr. Morters warned that if certiorari is not granted in cases where the denial of access to procedure is readily apparent, Congress by virtue of the jurisdiction given to the Court pursuant to Article III, Sec. 2, is essentially making a law which abridges the right to seek redress of grievances in the judicial forum and denies due process. *The constitutional conflict created by the denial of certiorari has now made this concern a reality.*

The denial of certiorari has also presented a serious Supremacy Clause problem since the Court's exercise of discretionary jurisdiction supersedes the rights given by the First, Fifth, and Fourteenth Amendments. Finally, this denial of certiorari has exposed a serious flaw in the certiorari criteria set forth in Rule 10. Thus, the Court's decision has

created other substantial grounds not previously presented which require a rehearing.

The right of access to a particular process is a fundamental right which can be seen in a number of different contexts. As discussed on page 20 of Morters' Petition, a fair trial in a fair tribunal is a basic requirement of due process. *Weiss v. United States*, 510 U.S. 163, 178, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1984) and *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The Supreme Court recently reaffirmed this principle in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. ___, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009).

Other situations not previously discussed demonstrate the importance of access to process in our legal system. The Sixth Amendment guarantees access to a jury trial in criminal cases, while the Seventh Amendment preserves such right in certain civil cases. Trial by jury has been described as a "fundamental liberty". See *Lecates v. Justice of Peace Court 4 of State of Del.*, 637 F. 2d 898, 909 (3rd Cir. 1980). The Fifteenth and Nineteenth Amendments guarantee access to the voting process. In *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), the Court noted that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

The Court is currently considering a case involving access to the political airwaves and free speech in *Citizens United v. Federal Election Commission*, Docket No. 08-205. Concern about providing access to the federal courts was recently expressed by the Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, in a letter published in the October 15, 2009 edition of *The Wall Street Journal* which addressed his efforts to meet the needs of the federal judiciary. Senator Leahy commented that "Congress should neither delay nor deny justice to Americans seeking access to their courts." (Sec. A, p. 16, col. 4, lines 78-81) *Because access to process is such a fundamental right, cases involving the denial of access require strict scrutiny to remedy such violations.*

It is well established that it is the duty of the Supreme Court to act as the ultimate interpreter of the Constitution. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), Chief Justice Marshall stated that "*[i]t is emphatically the province and duty of the judicial department to say what the law is.*" (Emphasis added) According to *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958), the interpretation of the Fourteenth Amendment by the Supreme Court is the supreme law of the land. In *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), Justice Brennan referred to the responsibility of the Court as the ultimate interpreter of the Constitution. Citing *Marbury* and *Baker*, the Court in *Powell v.*

McCormack, 395 U.S. 486, 549, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), stated that " . . . it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." In *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Court reaffirmed *Marbury*'s holding that *it is the province and duty of the Supreme Court to say what the law is.*

Given that the access rights under the First, Fifth, and Fourteenth Amendment are phrased in *mandatory* terms, *the Constitution requires the enforcement of these rights*. Pursuant to the constitutional oath taken in accordance with Article VI of the Constitution and 5 U.S.C. § 3331, the Court *must support and defend* the Constitution. The judicial oath set forth in 28 U.S.C. § 453 *requires* the Court to perform all duties under the Constitution and laws of the United States. There is no greater duty than the protection of fundamental rights of access to process guaranteed by the Constitution, and the Court's oaths make such protection mandatory.

In light of the Court's duty as the ultimate interpreter of the Constitution and the need to avoid constitutional conflict between the Court's Article III jurisdiction and the constitutional rights afforded under the First, Fifth, and Fourteenth Amendments, *the Supreme Court must grant certiorari* in cases where access to due process is denied. Only by exercising its discretion in such a manner can constitutional consistency be maintained between the Court's jurisdiction and constitutional rights. Such action will

eliminate Supremacy Clause problems since constitutional rights of access to due process will not be subordinate to the Court's constitutional jurisdiction.

The foregoing approach finds support from the following passage in the *Marbury* opinion:

> "It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in *pursuance* of the constitution, have that rank." [Emphasis added]
> *Marbury*, 5 U.S. at 180.

Since the Constitution and only those laws made in pursuance thereof are supreme, the discretionary jurisdiction given pursuant to § 1257(a) must be exercised in accordance with, and not in conflict with, the Constitution. Otherwise, § 1257(a) becomes a law at odds with the Constitution.

The denial of certiorari in this case has exposed a serious flaw in the considerations under Rule 10[1] which govern review on certiorari. Pursuant to 28 U.S.C. § 2071(a), Congress gave the Supreme Court the power to prescribe rules for the conduct of its business. Noticeably absent from the criteria created is any mention of the Constitution or due process of law.

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[1] Rule 10 is set forth at R. App. B1-2.

Since the protection of access to due process is vital, it is inconceivable why the criteria do not include such matter or make any reference to the protection of constitutional rights. The criteria do not reflect the Court's responsibility as the ultimate guardian of constitutional rights and thus represent an underlying cause of the conflict between the Court's discretionary jurisdiction and the rights given under the First, Fifth, and Fourteenth Amendments. By granting this petition, the Court can effectively remedy this conflict through a decision which adds a criterion providing that certiorari will be granted where a state or federal court has decided a case in a manner which has denied access to an established constitutional standard of trial court or appellate due process.

The Court has previously stated that the denial of certiorari does not import any expression of its views as to the merits of the case or whether the case was correctly decided. See for example, *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 67 L. Ed. 361 (1923); and *Teague v. Lane*, 489 U.S. 288, 296, 109 S. Ct. 1060, 108 L. Ed. 2d 334 (1989). Where a certiorari petition which presents a question as to the sufficiency or quality of due process is denied, it would be difficult for the lower courts to infer any views by the Supreme Court as to the merits. There may be a reasoned debate as to whether the process afforded was sufficient, or the decision may be supportable on other grounds. Because due process access denial cases tend to be "either/or" propositions,

however, *the Court should be greatly concerned that its failure to grant certiorari in access denial situations will be interpreted by the lower courts as approvals of such conduct.*

Certiorari denials in access deprivation cases resemble summary dispositions of appeals based on insubstantiality of federal question grounds which occurred in cases prior to the 1988 jurisdictional revision. Such dispositions were interpreted as decisions on the merits according to *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247, 79 S. Ct. 978, 3 L. Ed. 2d 1200 (1959). In this litigation, the Wisconsin Supreme Court obviously interpreted the Court's previous denials of certiorari as acquiescence in those denials of access to due process at the trial court and appellate levels. (See discussion as outlined on pages 30 through 33 of his Petition for Certiorari.)

In a Supreme Court order in *Flynn v. United States*, 75 S. Ct. 285, 286, 99 L. Ed. 1298 (1955), Justice Frankfurter indicated that a petition for rehearing is part of the appellate procedure authorized by the Supreme Court Rules *and should not be treated as an empty formality.* The conflict herein between the due process rights guaranteed by the Fourteenth Amendment and the exercise of the Court's discretion is far from a formality. Similarly, the denial of certiorari is at odds with the rights guaranteed by the First and Fifth Amendments. These are very real constitutional conflicts which require a rehearing.

The Court in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 73, 75 S. Ct. 614, 99 L. Ed. 897 (1955) indicated that there must be "special and important reasons" for the granting of certiorari. *Nothing can be more important than maintaining the supremacy of the entire Constitution and insuring that one provision does not triumph over another. Rice* also warned that the Court should avoid the decision of constitutional issues unless avoidance becomes evasion. *Rice*, 349 U.S. at 74. The failure to grant a rehearing in this case would constitute an evasion of a real constitutional conflict. As the ultimate arbiter of the Constitution, it is the Court's responsibility to resolve such matters and insure that the lower courts are diligent in protecting such constitutional rights.

CONCLUSION

In a letter to Horace Greeley, President Abraham Lincoln stated "I shall try to correct errors when shown to be errors." See *Bartlett's Familiar Quotations*, p. 475, 17th Edition (2002). Given the Court's substantial workload,[2] it is not possible to correct all errors. However, constitutional conflicts and Supremacy Clause problems simply must be rectified since the Constitution is the supreme law of the land. This

[2] According to The Justices' Caseload at the Supreme Court Website (www.supremecourtus.gov) more than 10,000 cases are on the docket each term.

Petition for Rehearing has demonstrated a constitutional conflict between the Court's constitutional jurisdiction and the rights of access set forth in the First, Fifth, and Fourteenth Amendments thereby resulting in a Supremacy Clause dilemma. Mr. Morters has identified a serious flaw in the certiorari criterion listed in Rule 10 and has demonstrated the need for a new criterion covering the deprivation of access to due process. This petition clearly sets forth substantial grounds not previously presented which require a rehearing.

Since the *Wisconsin courts* originally *failed in their responsibility* to insure access to due process, the United States Supreme Court as the ultimate guardian of the Constitution must now remedy the violation of this right. By doing so, the Court can resolve the constitutional conflict and Supremacy Clause problems and enunciate a new criterion for certiorari review which emphasizes *the importance of providing access to an existing standard of procedural due process*. A decision reminding the lower courts of their constitutional responsibilities will ultimately reduce the Court's workload. For the reasons set forth in this Petition, Ronald W. Morters' Petition for Rehearing of the Order denying his Petition for Writ of Certiorari should be granted, and it is respectfully requested that the Court grant this Petition for Rehearing.

Dated this 2nd day of November, 2009.

Respectfully submitted,

RONALD W. MORTERS
Petitioner, Pro Se
2755 Minot Lane
Waukesha, Wisconsin 53188
Telephone: (262) 544-4355

SUPREME COURT RULE 44 CERTIFICATE

I hereby certify to this Honorable Court that the reasons for seeking this Petition for Rehearing are limited to other substantial grounds not previously presented and that this Petition is being promptly presented in good faith and not for delay.

RONALD W. MORTERS
Petitioner, Pro Se

REHEARING APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 13, 2009

Mr. Leonard W. Schulz
W230 S8775 Clark Street
P.O. Box 238
Big Bend, WI 53103

Re: Ronald W. Morters
v. Charles H. Barr, et al.
No. 09-133

Dear Mr. Schulz:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

REHEARING APPENDIX B

Rule 10. Consideration Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.